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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1775

THE COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JACK B. WESTCOTT,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

FRANCIS X. BELLOTTI
Attorney General
S. STEPHEN ROSENFELD
Assistant Attorney General
HOWARD WHITEHEAD
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1014

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v.

JACK B. WESTCOTT,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Introductory Statement

The Commonwealth of Massachusetts hereby petitions this Court for a writ of certiorari to review a judgment of the Supreme Judicial Court of Massachusetts.

Opinions Below

The opinion of the majority of the Justices of the Supreme Judicial Court is reported at MASS. ADV. SH. (1976) 696-703 and is appended hereto at pp. A-1 through

A-6. The opinion of the dissenting Justice of the Supreme Judicial Court is reported at MASS. ADV. SH. (1976) 704-716 and is appended hereto at pp. A-6 through A-16.

Jurisdiction

The judgment of the Supreme Judicial Court was entered on March 12, 1976 and is appended hereto at p. A-17. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3) (1966).

Question Presented

Whether the Act of February 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended by* the Act of March 13, 1962, Ch. 219, [1962] Mass. Acts and Resolves 107, insofar as it differentiates between residents and non-residents of Massachusetts relative to the right to fish in Massachusetts waters, violates the Privileges and Immunities Clause contained in Article IV, § 2 of the United States Constitution.

Statute Involved

Act of February 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended by* Act of March 13, 1962, Ch. 219, [1962] Mass. Acts and Resolves 107.

> It shall be unlawful during the months of July, August and September for any person who has not been a legal resident of this commonwealth during the preceding year to use beam or otter trawls to drag for fish in that part of the waters of Vineyard Sound lying in the towns of Chilmark, Gay Head and Gosnold, and included between an imaginary line running

> from the extreme western point of Gay Head to the extreme western point of Nashawena Island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light. Violation of this act shall be punished by a fine of not less than five hundred nor more than one thousand dollars.

Statement of the Case

The Act of February 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended by* the Act of March 13, 1962, Ch. 219, [1962] Mass. Acts and Resolves 107, makes it unlawful, during the months of July, August and September, for any person who has not been a legal resident of Massachusetts during the preceding year to use beam or otter trawls to drag for fish in certain of the State's waters. On September 5, 1973, Jack B. Westcott was arrested by an officer of the Massachusetts Department of Natural Resources for allegedly violating the 1923 Act. On April 24, 1974, he was tried and found guilty by the District Court of Massachusetts.

Upon his conviction in the District Court, Westcott pursued his right to *de novo* review in the Superior Court, wherein he filed a motion to dismiss the action. The grounds of the motion were that the 1923 Act, insofar as it differentiates between residents and nonresidents of Massachusetts, violates: (1) the Privileges and Immunities Clause contained in Article IV, § 2 of the United States Constitution and (2) the Equal Protection Clause of the United States Constitution. In addition to Westcott's motion, the parties submitted to the Court an agreed statement of facts. The statement indicated that, at the time of his arrest, Westcott was a resident of Rhode Island and had not been a resident of Massachusetts during the preceding year or during the year preceding July

1, 1973. It further indicated that he was arrested while dragging by means of otter trawl for scup and fluke, which are migratory fish, in the waters described by the 1923 Act.

The Superior Court reserved decision on the case and, on May 23, 1974, reported to the Appeals Court the questions of law raised by Westcott's motion to dismiss. However, on May 15, 1975, before briefing and argument in the Appeals Court had taken place, the Supreme Judicial Court granted direct appellate review. Thereafter, on March 12, 1976, the Supreme Judicial Court, declaring that the 1923 Act violates the Privileges and Immunities Clause, and without ruling on Westcott's Equal Protection claim, entered a judgment remanding the case to the Superior Court with the direction that the motion to dismiss be allowed.[1]

Reasons for Granting the Writ

I. The Decision of the Supreme Judicial Court Involves a Substantial Federal Question Not Heretofore Decided by This Court.

In deciding that the 1923 Act violates the Privileges and Immunities Clause, the Supreme Judicial Court relied exclusively on the authority of *Toomer* v. *Witsell,* 334 U.S. 385, 395-402 (1948). It has been, and continues to be, the contention of Massachusetts that the enactment by Congress of the Submerged Lands Act of 1953, five years after *Toomer,* has fundamentally altered the nature of State power over coastal fisheries and has thus revised the premises on which the *Toomer* decision was based. This Court has never had occasion to address the relationship between the Submerged Lands Act, the nature of State power over coastal fisheries, and the Privileges and Immunities Clause. The instant case squarely presents such an opportunity.

[1] Mr. Justice Reardon, dissenting, expressed the view that the 1923 Act is constitutional.

Moreover, the Massachusetts statute struck down by the Supreme Judicial Court is only one of many State statutes raising the same issue. At least twenty-two other statutes of nine States also differentiate between residents and nonresidents relative to the right to take fish in coastal waters.[2] While the decision of the Supreme Judicial Court directly invalidates only the 1923 Massachusetts statute, it will, of course, have a substantial *stare decisis* impact on the other statutes as well. In reality, it will become guiding precedent in the area. Clearly, when the determination of a novel federal question entails such broad ramifications, it is this Court, and not a State Court, which should be the author of that determination.

Finally, State statutes of the kind here at issue ultimately suggest not only a Privileges and Immunities question but an Equal Protection question as well. The Equal Protection question is currently before this Court in *Douglas* v. *Seacoast Products, Inc.* (No. 75-1255) (probable jurisdiction noted April 26, 1976). However, the *Douglas* case does not present the Privileges and Immunities question. Thus, this case complements *Douglas* and offers the Court an opportunity, by way of

[2] Those statutes are Del. Code Ann., Conservation Law, tit. 7, §§917, 1115, 1119 (1974); Ann. Code of Md., Natural Resources, §§4-618, 4-703, 4-704, 4-805, 4-1003, 4-1004 (1974 and Supp. 1975); Mass. Gen. Laws Ann., ch. 130, §§38, 55 (1976); Mich. Comp. Laws Ann., §308.24 (1967); N.H. Rev. St. Ann. §211.23, 211.62-d (Supp. 1975). McKinney's Consolidated Laws of N.Y., Environmental Conservation Law, §§13-0333, 13-0335, 13-0341(7) (1973); Gen. Laws of R.I., §§20-6-1, 20-6-2, 20-12-2 (1968 and Supp. 1975); Vt. Stat. Ann., title 10, §4608 (1973); and Va. Code §28.1-60 (1950).

certiorari and consolidation, to consider both questions contemporaneously.

For all of the above reasons, review of the decision of the Supreme Judicial Court is appropriate.

II. The Decision of the Supreme Judicial Court Is in Error.

The Supreme Judicial Court chose not to recognize that the Submerged Lands Act had deprived the decision in *Toomer* v. *Witsell, supra,* of its vitality. Instead the Court asserted that the *Toomer* decision remained as its guidepost. As noted above, Massachusetts disagrees.

The underlying action in *Toomer* was one to enjoin the enforcement of a South Carolina statute which imposed a prohibitory license fee on nonresident boats taking fish from the marginal sea within three miles of that State's coastline. The plaintiff, a nonresident of South Carolina, claimed that the statute was violative of the Privileges and Immunities Clause.

Earlier authority appeared to be conclusive of the statute's validity. In *McCready* v. *Virginia,* 94 U.S. 391 (1877), the Court had ruled that a Virginia statute prohibiting nonresidents from planting oysters in the beds of its tidewaters did not violate the Privileges and Immunities Clause. The basis of the opinion had been stated as follows:

> "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. In like manner, the States own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its People, and the ownership is that of the people in their united sovereignty. The title

> thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. There has been no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.
>
> . . . . . .
>
> . . . [W]e think we may safely hold that the citizens of one State are not invested by [the Privileges and Immunities Clause] with any interest in the common property of the citizens of another State." *Supra* at 394-395. (Citations omitted.)

Articulated another way, it had been the view of the Court that the citizens of a State derive their right to use a fishery located in the tidewaters of that State, not from the mere fact of their citizenship, but from the fact that, as citizens, they collectively own the fishery. Such being the case, their right could not be deemed a privilege or immunity of citizenship. *See also Corfield* v. *Coryell,* 6 F. Cas. 546, 551-552 (C.C.E.D. Pa. 1823).

However, the *Toomer* Court, noting that the fish involved in *McCready* were stationary and located in tidewaters, while those involved in *Toomer* were free-swimming and located in the marginal sea, declared that a State's

interests in each of the two types of fish was fundamentally different. The specific difference was that, while a State's interests in the former might be proprietary in nature, its interests in the latter were not. *Supra* at 401-403. Such being the case, the right of a State's citizens to take free-swimming fish from the marginal sea could not be viewed as a property right but must, instead, be considered to be a privilege or immunity of citizenship which could not be denied to nonresidents. On that premise, the Court proceeded to declare the South Carolina statute unconstitutional.

While the *Toomer* decision would, at first, appear to be controlling of the instant case, its authority must nevertheless be considered in light of subsequent developments in the law of coastal resource management. More or less contemporaneously with its decision in *Toomer,* this Court had determined that the United States, and not the individual coastal States, possessed "paramount rights" in the marginal sea and control over the resources located therein. *United States* v. *Texas,* 339 U.S. 707, 715-720 (1950); *United States* v. *Louisiana,* 339 U.S. 699, 704-706 (1950); *United States* v. *California,* 332 U.S. 19, 29-41 (1947). The views of the Court reflected by that determination were, of course, apparent in the *Toomer* decision itself. *See Toomer, supra* at 402-403. However, public reaction to the *Texas, Louisiana* and *California* decisions was not favorable. In particular, Congress considered them to constitute a usurpation by the Federal Government of rights which had historically belonged to the States. *See* H.R. REP. No. 215, 83d Cong., 1st Sess. 15, 34-53 (1953); S. REP. No. 133, 83d Cong., 1st Sess. 6-8, 54-74 (1953). The result was the enactment of the Submerged Lands Act. *See* H.R. REP. No. 215, *supra* at 5; S. REP. No. 133, *supra* at 5.

The Act is now embodied in 43 U.S.C. § 1301 *et seq.* (1966). By way of 43 U.S.C. § 1311(a), Congress has expressly conveyed to the respective coastal States some of the paramount rights which the United States had been deemed to possess. The section provides:

> "It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States . . ."

The definition of the term "natural resources," as set forth in § 1301(e), includes all fish.

Section 1311(a) clearly appears to convey rights of a proprietary nature. That it has, in fact, done so has been confirmed by the decision of this Court in *Alabama* v. *Texas,* 347 U.S. 272 (1954), wherein the Court upheld the constitutionality of the Act as a proper exercise of the power, granted to Congress by U.S. CONST., Art. IV, § 3, cl. 2, "to dispose of . . . Property belonging to the United States." Thus, it would seem that the respective coastal States now possess the same rights concerning free-swimming fish in the marginal sea as they have always possessed concerning stationary fish in the tidewaters. If it is true that the States do possess such rights, then the basic distinction drawn by the Court in *Toomer, supra,*

between the facts of that case and the facts of the *McCready* case, *supra,* has been eliminated. Moreover, if it is true that the distinction has been eliminated, then *McCready,* rather than *Toomer,* is now controlling of all cases wherein a State statute prohibiting nonresident fishing is challenged as violative of the Privileges and Immunities Clause, including the instant case.

Given *McCready* as controlling of the instant case, one must conclude that the decision of the Supreme Judicial Court to the effect that the 1923 Act of Massachusetts is violative of the Privileges and Immunities Clause is erroneous and should be reversed.

Conclusion

For the reasons stated above, Massachusetts urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General
S. STEPHEN ROSENFELD
Assistant Attorney General
HOWARD WHITEHEAD
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1014

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APPENDIX

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SUFFOLK, ss: SITTING, 1975

No. 300

COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,
v.
JACK B. WESTCOTT,
APPELLEE.

OPINIONS ISSUED MARCH 12, 1976

BRAUCHER, J. Statute 1923, c. 35, as amended by St. 1962, c. 219, in effect prohibits nonresidents of Massachusetts from dragging for fish in Vineyard Sound during the months of July, August and September.[1] On the authority of *Toomer* v. *Witsell,* 334 U.S. 385 (1948), we hold that the statute violates the privileges and immunities clause of the Constitution of the United States. U.S. Const. art. IV, § 2. We do not answer the question whether the requirement of legal residence "during the preceding year" vio-

[1] "It shall be unlawful during the months of July, August and September for any person who has not been a legal resident of this commonwealth during the preceding year to use beam or otter trawls to drag for fish in that part of the waters of Vineyard Sound lying in the towns of Chilmark, Gay Head and Gosnold, and included between an imaginary line running from the extreme western point of Gay Head to the extreme western point of Nashawena island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light. Violation of this act shall be punished by a fine of not less than five hundred nor more than one thousand dollars."

lates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The defendant was arrested on September 5, 1973, by an officer of the Department of Natural Resources while engaged in dragging by means of an otter trawl for scup and fluke, which are migratory fish. His vessel was registered out of Point Judith, Rhode Island, and he was and is a resident of Narragansett, Rhode Island. He had not been a legal resident of the Commonwealth during the year preceding the arrest. The arrest occurred within waters covered by the statute.

The defendant was found guilty as charged in the District Court of Dukes County. On appeal to the Superior Court, the parties submitted a statement of agreed facts. The judge reserved decision on the defendant's motion to dismiss. Under G.L. c. 278, § 30A, the judge reported the case so far as necessary to present the following questions of law, and we granted the Commonwealth's application for direct appellate review:

"1. Does Chapter 35 of the Acts of 1923 as Amended violate the Privileges and Immunities Clause in Article IV §2(1) of the Constitution of the United States, by imposing differential treatment between fishermen who are residents of the Commonwealth and those who are not?

"2. Do the criteria for legal residence in the Commonwealth during the preceding year as provided in Chapter 35 of the Acts of 1923 violate the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.

1. *The ownership theory.* The Commonwealth's argument as to the first question rests largely on *McCready* v. *Virginia,* 94 U.S. 391 (1876). There the Supreme Court upheld a Virginia statute prohibiting nonresidents from planting oysters in the beds of its tidewaters. The court said the States owned the beds, the tidewaters themselves,

"and the fish in them, so far as they are capable of ownership while running." *Id.* at 394. The planting of oysters in tidewater beds was like the planting of corn on dry land owned by the State; in both cases, the State could confine the use of the land to its own citizens. *Id.* at 396.

Later cases did little to reinforce the concept of ownership of migratory fish in the marginal sea. In *Manchester* v. *Massachusetts,* 139 U.S. 240, 265 (1891), a regulation of fishing in Buzzards Bay was upheld; "it was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other States." In *Missouri* v. *Holland,* 252 U.S. 416, 434 (1920) (Holmes, J.) dealing with migratory birds, the court said, "To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership."

In *Toomer* v. *Witsell,* 334 U.S. 385 (1948), a South Carolina statute discriminated against nonresidents fishing for migratory shrimp in the marginal sea. The Supreme Court held that the statute violated the privileges and immunities clause, which bars "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Id.* at 396. "The whole ownership theory, in fact," the court said, "is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Id.* at 402. The *McCready* case was distinguished as involving stationary oysters rather than free-swimming fish, and tidewaters rather than marginal sea. *Id.* at 401.

The *Toomer* case has been treated as controlling in cases like ours. *Brown* v. *Anderson,* 202 F. Supp. 96, 102-103

(D. Alas. 1962). *Gospodonovish* v. *Clements,* 108 F. Supp. 234, 237 (E.D. La. 1951), *appeal dismissed,* 344 U.S. 911 (1953). *Edwards* v. *Leaver,* 102 F. Supp. 698, 703 (D. R.I. 1952). *Russo* v. *Reed,* 93 F. Supp. 554, 559-560 (D. Me. 1950). *Steed* v. *Dodgen,* 85 F. Supp. 956, 958 (W.D. Tex. 1949). *Dobard* v. *State,* 149 Tex. 332, 342 (1950). Cf. *Mullaney* v. *Anderson,* 342 U.S. 415, 417 (1952); *Schakel* v. *State,* 513 P.2d 412, 414 (Wyo. 1973) (deer hunting). But cf. *Anderson* v. *State,* 213 Ark. 871, 875 (1948) (fishing in inland waters); *State* v. *Kemp,* 73 S.D. 458, 465 (1950), *appeal dismissed,* 340 U.S. 923 (1951) (non-resident hunters of migratory water fowl constituted "a peculiar source of evil"). Similar decisions have been made under the equal protection clause of the Fourteenth Amendent. *Takahashi* v. *Fish & Game Comm'n,* 334 U.S. 410, 421 (1948) (discrimination against aliens). *Edwards* v. *Leaver, supra* (discrimination against corporations). The *McCready* case, if it retains any vitality, seems now to be restricted to shellfish or to tidewaters. See *State* v. *Norton,* 335 A.2d 607, 615 (Me. 1975) (clams); *Bruce* v. *Director, Dep't of Chesapeake Bay Affairs,* 261 Md. 585, 607-611 (1971) (oysters).

2. *The Submerged Lands Act of 1953.* The Commonwealth contends that the rationale of the *Toomer* case has been completely undercut by the enactment of the Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.* (1970). Section 1311(a) of that act declares that "title" to the "natural resources" within "navigable waters within the boundaries of the respective States" is vested in the respective States, and § 1301(e) defines "natural resources" to include "fish." Vineyard Sound is undoubtedly part of the navigable waters of Massachusetts. Hence, it is argued, the ownership theory rejected in the *Toomer* case has now been revived by act of Congress.

The Submerged Lands Act of 1953 was a congressional response to three Supreme Court cases: *United States* v. *Texas,* 339 U.S. 707 (1950). *United States* v. *Louisiana,* 339 U.S. 699 (1950). *United States* v. *California,* 332 U.S. 19 (1947). Those cases had held that the Federal government and not the individual coastal States had paramount rights in the marginal sea and control over the resources contained therein. "The Act merely confirmed the States' pre-existing rights . . . by, in effect, quitclaiming all federal claims thereto." *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 318 (1973). We think, in the language of the *Toomer* case, that the ownership language of the act should be read as "legal shorthand" for the "power to preserve and regulate," at least in its application to fish swimming in the ocean.

Decisions under the act have not given it any such effect as that for which the Commonwealth contends. In *Corsa* v. *Tawes,* 149 F. Supp. 771, 773 (D. Md.), *aff'd,* 355 U.S. 37 (1957), the court cited the act in deciding that regulation of coastal fisheries is "within the police power of the individual states," but did not reach the problem of discrimination against nonresidents. 149 F. Supp. at 777-778. In *Kake* v. *Egan,* 174 F. Supp. 500, 502-504 (D. Alas. 1959), *aff'd sub nom. Metlakatla Indian Community, Annette Island Reserve* v. *Egan,* 362 P.2d 901, (Alas. 1961), *aff'd sub nom. Kake* v. *Egan,* 369 U.S. 60 (1962), the court cited the *Toomer* case and the act; it said that the ownership theory "has to some extent been repudiated and the modern concept contemplates that state control is founded upon the power to regulate in the state the protection of these resources [fish] for all the people." See *Glenovich* v. *Noerenberg,* 346 F. Supp. 1286, 1291-1293 (D. Alas.), *aff'd* 409 U.S. 1070 (1972). In *Brown* v. *Anderson,* 202 F. Supp. 96, 102-103 (D. Alas. 1962), a case like the present one,

the State statute was held unconstitutional on the authority of the *Toomer* case, without mention of the act.

3. *Durational residence requirement.* Our conclusion that the statute violates the privileges and immunities clause makes it unnecessary to consider whether the requirement of residence for one year violates the equal protection clause. See *Massey* v. *Apollonio,* 387 F. Supp. 373, 376-377 (D. Me. 1974) (three-year residence for lobstermen unconstitutional). Compare *Memorial Hosp. v. Maricopa County,* 415 U.S. 250, 258-260 (1974), with *Sosna* v. *Iowa,* 419 U.S. 393, 409 (1975).

4. *Disposition.* We answer the first question reported by the Superior Court "Yes." We do not answer the second question. The case is remanded to the Superior Court, where the defendant's motion to dismiss is to be allowed.

So ordered.

Reardon, J. (dissenting). It is my view that there is no violation of the privileges and immunities clause. In *McCready* v. *Virginia,* 94 U.S. 391, 395 (1876), involving a Virginia statute prohibiting nonresidents from planting oysters in the beds of its tidewaters, it was made clear that the tidewaters themselves were owned by the States as well as the fish in them "subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States." The court went on to say that there was no such grant of power over the fisheries which remain under the exclusive control of the State which may regulate their use, again assuming no obstruction of navigation.

The *McCready* case was followed by *Toomer* v. *Witsell,* 334 U.S. 385 (1948), involving a South Carolina statute which provided for an extremely expensive license fee on nonresidents fishing for migratory shrimp within the three-mile maritime belt (the marginal sea) off the coast of that State. In the *Toomer* case the court distinguished the *McCready* case on the grounds that (1) *McCready* was concerned with the taking of oysters which are essentially stationary while the *Toomer* case involved the taking of free-swimming fish; and (2) the ownership rights of the States in the marginal sea are different from their rights in their tidewaters. 334 U.S. at 401.

The *Toomer* case was followed by the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.* (1970).[1] As the

[1] The following sections are of importance:

§ 1301. "Definitions.

. . .

"(a) The term 'lands beneath navigable waters' means—(1) all lands within the boundaries of each of the respective States which are covered by non-tidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction."

"(c) The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."

"(e) The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power."

§ 1311. "Rights of the States.

"(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use.

"It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective

majority opinion recognizes: "The Submerged Lands Act of 1953 was a congressional response to three Supreme Court cases: *United States* v. *Texas*, 339 U.S. 707 (1950).

States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof."

§ 1312. "Seaward boundaries of States.

"The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

§ 1314. "Rights and powers retained by the United States; purchase of natural resources; condemnation of lands.

"(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title."

United States v. *Louisiana*, 339 U.S. 699 (1950). *United States* v. *California*, 332 U.S. 19 (1947). Those cases had held that the Federal government and not the individual coastal States had paramount rights in the marginal sea and control over the resources contained therein." *Ante* at .[*] As the legislative history makes clear, both the Senate and House committees which favorably reported the bill[2] considered the holdings of these three cases a usurpation by the Federal government of what had been perceived as the States' traditional rights of ownership and control in this area. H.R. Rep. No. 215, 83d Cong., 1st Sess. 15, 34-53 (1953). S. Rep. No. 133, 83d Cong. 1st Sess. 6-8, 54-74 (1953) (1953 U.S. Code Cong. & Ad. News 1385, 1399, 1417-1437, 1479-1481, 1505-1526). Congress sought to remedy this situation through the Submerged Lands Act, the purpose of which was to establish and confirm the claims and rights of the respective States to the lands beneath the marginal seas and the resources within such lands and water, by conveying to the States whatever rights the Federal government had in those lands and resources. H.R. Rep. No. 215, *supra* at 5. S. Rep. No. 133, *supra* at 5. That a proprietary right was conveyed to the States was confirmed in *Alabama* v. *Texas*, 347 U.S. 272 (1954), in which the Supreme Court upheld the constitutionality of the act as a proper exercise of Congress's power "to dispose of . . . Property belonging to the United States" under Article IV, § 3, cl. 2, of the United States Constitution.

Since "fish" are included among the "natural resources," "title to and ownership of" which have been vested in the States (43 U.S.C. § 1301(e) and § 1311[a][1][1970]), it would appear that the act intends that the

[*] Mass. Adv. Sh. (1976) at .

[2] The Committee on the Judiciary in the House and the Committee on Interior and Insular Affairs in the Senate.

States shall possess the same ownership rights in migratory fish swimming in waters within the three-mile limit as they possess with respect to tidewater fish. In effect the Submerged Lands Act squares the present case with the *McCready* case. The two grounds which were used to distinguish *McCready* in the *Toomer* case are no longer pertinent.

The majority opinion marshals a large number of cases in support of its proposition that "[t]he *Toomer* case has been treated as controlling in cases like ours." *Ante* at .[b] However, all but two of those cases were decided prior to the passage of the Submerged Lands Act in 1953. Of the two post-1953 cases one is concerned with deer hunting in Wyoming (*Schakel* v. *State,* 513 P.2d 412, 414 [Wyo. 1973]), and the other is an Alaskan Federal district course case which does not discuss the impact of the act (*Brown* v. *Anderson,* 202 F. Supp. 96, 102, 103 [D. Alas. 1962]). Had the Submerged Lands Act not intervened, the cases cited by the majority opinion would be instructive. However, since the outcome of the present case turns on the act and its interpretation, I do not find cases decided before the act became law to be especially relevant authority. For similar reasons I do not consider cases dealing with deer hunting, an activity to which the act clearly does not apply, nor cases which do not even consider the impact of the act on fishing rights, to be useful precedents for resolving the issue now before us.

The majority opinion when it does turn to the Submerged Lands Act dismisses its impact with the statement: "We think, in the language of the *Toomer* case, that the ownership language of the act should be read as 'legal shorthand' for the 'power to preserve and regulate,' at least in its application to fish swimming in the ocean." *Ante* at .[c]

[b] Mass. Adv. Sh. (1976) at .
[c] Mass. Adv. Sh. (1976) at .

The opinion does not develop why the clear language of the statute should be given such a construction contrary to its plain meaning. Section 1311(a)(1) establishes in the States "title to and ownership of" natural resources, including fish, within the three-mile limit; § 1311(a)(2) deals with "the right and power to manage" said resources. The legislative history indicates that the rights of ownership and the rights of management were placed in separate clauses and made independent of one another in order to preserve under the separability clause (Submerged Lands Act of 1953, c. 65, tit. II, § 11, 67 Stat. 33) the latter powers should the conveyance of title and ownership be eventually ruled unconstitutional. S. Rep. No. 133, *supra* at 13, 19; pt. 2, 9-10, 13-14 (1953 U.S. Code Cong. & Ad. News 1486, 1495, 1543, 1546-1547). However, the United States Supreme Court in *Alabama* v. *Texas, supra,* upheld the constitutionality of the conveyance of "title to and ownership of" the lands and resources described in the act. By construing the ownership language of § 1311(a)(1) to mean no more than the management and regulation language of § 1311(a)(2), this court today essentially reads the former section out of the statute. Even a cursory reading of the legislative history indicates that the Congress was well aware that § 1311(a)(1) was concerned with an *ownership* interest in the ordinary sense of the word and not merely a power to preserve and regulate. H.R. Rep. No. 215, *supra* at 5-6, 15, 24-47. S. Rep. No. 133, *supra* at 5, 54-68 (1953 U.S. Code Cong. & Ad. News 1385, 1388-1389, 1399, 1417-1431, 1479, 1505-1520). Given the language and the structure of the statute, the legislative history, and the decision in *Alabama* v. *Texas, supra,* I can discern no justification for a statutory construction which renders the ownership language of § 1311(a)(1) a nullity, an empty congressional exercise, with respect to fish.

Of course, it still may be argued that even conceding

that the Commonwealth has ownership rights in the fish within its three-mile limit, the privileges and immunities clause prohibits the Commonwealth from exercising those property rights in such manner as to exclude nonresident fishermen; and perhaps this is what the majority intended in their treatment of the ownership language of the act. However, this position would in effect overrule the *McCready* case. While there is language in the *Toomer* case (334 U.S. at 401-402), questioning the viability of *McCready*, I would not be inclined to follow that path. Such language is not only dictum but was written at a time when the Supreme Court was clearly of opinion that the States did not possess any proprietary interests in the marginal sea. See *United States* v. *Texas*, 339 U.S. 707 (1950); *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *California*, 332 U.S. 19 (1947). Congress, through the passage of the Submerged Lands Act, has so altered the nature of the States' interests in the marginal sea and the resources therein, including fish, that this dictum in the *Toomer* case, whatever its vitality at the time, is not a reliable guide to current Federal law.

While Congress of course could not overrule *Toomer's* resolution of the constitutional issue, it could, and I think did, alter the premises on which the decision was based. The basic assumptions which animated the Court's analysis in *Toomer* (as well as in the other cases of that time dealing with the rights of the States in the marginal sea) were the objects of congressional attention in the Submerged Lands Act. The dictum in *Toomer* alluded to above was clearly based on an opinion that State property interests in the resources in the marginal sea did not exist, and were but "fiction[s]" and "legal shorthand" (334 U.S. at 402).

Finally, while the majority do not rely on this argument, it is strenuously advanced by the defendant that whatever

the status of the State's ownership interests in the migratory fish within the marginal sea, the legislative history of the act, particularly portions of the debates in the House of Representatives, indicates that Congress did not intend to confer on the States the power to exclude out-of-State fishermen.[3] On the floor of the House, Mr. Colmer offered two amendments which would have prohibited unreasonable discrimination by a State in favor of its own citizens (as compared with citizens of other States) in the control and use of "national resources" in the first amendment, and the control, use, licensing, and taking of "fish, shrimp, and other migratory marine animal life" in the second amendment. 99 Cong. Rec. 2563-2564 (1953).[4] Both amendments were defeated. In the debate on the first amendment, Mr. Graham, chairman of the subcommittee which had held hearings on the bill,[5] stated that in his opinion

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[3] The debates in the House focused primarily on the rights to the oil and gas reserves under the marginal sea rather than on the question of fishing rights. However, on a number of occasions members did address themselves to fishing problems recognizing that the ownership of fish, as well as that of other natural resources, was to be conveyed to the States by the bill. See 99 Cong. Rec. 2488 (1953) (remarks by Mr. Colmer and of Mr. Celler); 2499 (remarks of Mr. Nicholson); 2583 (remarks of Mr. Williams).

[4] The first amendment read: "On page 6, line 4, after the words 'natural resources', insert the following: 'subject to the condition that there shall be no unreasonable disparity between the treatment by a State or its grantees of its citizens and the treatment by such State or its grantees of the citizens of another State in the management, administration, leasing, controlling, developing, and use of the said national resources.' " 99 Cong. Rec. 2563 (1953).

The second amendment read: "On page 6, line 4, after the words 'State resources', insert 'subject to the condition that there shall be no unreasonable disparity between the treatment by a State or its grantees of its citizens and the treatment by such State and its grantees of the citizens of another State in the management, administration, controlling, use, licensing, and taking of fish, shrimp, and other migratory marine animal life.' " 99 Cong. Rec. 2563-2564 (1953).

[5] Subcommittee No. 1 (Immigration and Nationality) of the Committee on the Judiciary.

the amendment was unnecessary given the Supreme Court's holding in the *Toomer* case. 99 Cong. Rec. 2563 (1953). However, in the debate on the second amendment Mr. Graham stated, "[I]t has always been my understanding that anything of a migratory nature, like migratory birds and such, must be settled by treaty or compact. This whole matter can be settled as between the States of Mississippi and Louisiana or between the States south thereof by a compact." 99 Cong. Rec. 2564 (1953). Of course if the content of Mr. Colmer's second amendment were already the law of the land or implicitly incorporated into the act, there would be no need for the compacts between the States referred to by Mr. Graham in urging the defeat of the amendment. The defendant places substantial reliance on what are simply the self-serving remarks of the proponent of the defeated amendments. In short, the legislative history on this point is ambiguous and inconclusive and does not compel the statutory interpretation the defendant advances.

I would conclude that the Submerged Lands Act establishes, conveys and vests an ownership interest in the States in the migratory fish within the marginal sea. Construing the statute in light of the *McCready* case demonstrates the propriety and constitutionality of the prohibition of nonresidents from fishing in those Massachusetts waters which St. 1923, c. 35, provides. The net effect of the Federal act and the *McCready* case is to establish a property right in that three-mile limit which the State can protect as it has done in this instance. There is thus no violation of the privileges and immunities clause.

The wisdom of the policies expressed in the Submerged Lands Act and in St. 1923, c. 35, is not the issue before us. Perhaps the Submerged Lands Act was not a wise piece of legislation. There were certainly many in Congress who expressed such a view (see H.R. Rep. No. 215, *supra*

at 58-60, 80-101, 114-124; S. Rep. No. 133, pt. 2, *supra* at 1-53 [1953 U.S. Code Cong. & Ad. News 1439-1473; 1534-1588]); and President Truman vetoed similar legislation twice (92 Cong. Rec. 10660 [1946]; 98 Cong. Rec. 6251 [1952]). But Congress persisted and did pass the act which was signed into law in 1953 by President Eisenhower. Act of May 22, 1953, Pub. L. No. 31, 67 Stat. 29. As for St. 1923, c. 35, perhaps a more "enlightened" course for Massachusetts would be to allow nonresidents to utilize its resources as freely as its own residents do. However, the Legislature has not arrived at this judgment, and I do not think in the circumstances presented by this case it was constitutionally compelled to do so.

I would conclude also that the statutory classification based on residency in Massachusetts does not constitute a violation of the equal protection clause. As discussed above, the Commonwealth has an ownership interest in the fish within its coastal waters out to the three-mile limit. "For this purpose the . . . [Commonwealth] represents its people, and the ownership is that of the people in their united sovereignty." *McCready* v. *Virginia, supra* at 394. See *Toomer* v. *Witsell, supra* at 408 (Frankfurter, J., concurring); *Maine* v. *M/V Tamano,* 357 F. Supp. 1097, 1100-1101 (D. Me. 1973). In this context there is a valid legislative purpose in preserving for the residents of the Commonwealth the fishing resources within its territorial waters; and the exclusion of out-of-State fishermen cannot be deemed arbitrary, capricious, irrational, or an invidious discrimination.

The facts of the present case do not provide an occasion to treat the durational aspect of the residency requirement of St. 1923, c. 35. The defendant is not a resident of Massachusetts, the record contains no indication that he desired to be a resident, and the requirement of one year's residency in no way brought the defendant within

the terms of the statute or increased his liability thereunder. Successful challenges to durational residency requirements have involved citizens of the State in which those challenges occurred. See, e.g., *Memorial Hosp.* v. *Maricopa County,* 415 U.S. 250 (1974); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

I would thus conclude that St. 1923, c. 35, is constitutional as applied against the defendant.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SUFFOLK, ss: SITTING, 1975

No. 300

COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,
v.
JACK B. WESTCOTT,
APPELLEE.

JUDGMENT ENTERED MARCH 12, 1976

We answer the first question "Yes." We do not answer the second question. The case is remanded to the Superior Court, where defendant's motion to dismiss is to be allowed.

Supreme Court, U. S.
FILED
NOV 19 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1775

THE COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JACK B. WESTCOTT,
RESPONDENT.

ON A WRIT OF CERTIORARI TO THE

SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI FILED JUNE 7, 1976
CERTIORARI GRANTED OCTOBER 4, 1976

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COMMONWEALTH OF MASSACHUSETTS,
v.
JACK B. WESTCOTT.

RELEVANT DOCKET ENTRIES

District Court

* * *	* * *
Date Entered	9-5-73
* * *	* * *
Date of the Return of Warrant and Examination	9-7-73
Plea	N.G.
Continuances	10-10-73 11-16-73 2-15-74 4-19-74 [4-26-74]
* * *	* * *
Found	G.
Fine	$500
* * *	* * *
Result	Appealed [;] Papers Forwarded to Superior Court

Superior Court

Apr. 26, 1974 (1)	Appeal from District Court
* * *	* * *
May 14, 1974 (4)	Defendant's motion to dismiss complaint
" 14, 1974 (5)	Agreed statement of facts—(Philip A. Rollins, District Attorney and attorneys for defendant)

May 23, 1974 (6)	Report to the Supreme Judicial Court, by the Court, Taveira, J.
• • •	• • •
Apr. 1, 1975	Papers forwarded to Appeals Court

Appeals Court

1	Apr. 1, 1975:	Entered.
• • •		• • •
6	May 15, 1975:	Application for Direct Appellate Review Allowed.

Supreme Judicial Court

Entered May 28, 1975
Argued October 6, 1975

3-12-76	We answer the first question "Yes." We do not answer the second question. The case is remanded to the Superior Court, where the defendant's motion to dismiss is to be allowed.
3-12-76	Rescript. Notice sent to counsel. See opinion on file.
Oct. 4, 1976	Petition for a writ of certiorari to the Supreme Court of the United States allowed.

[TITLE OMITTED IN PRINTING]

CRIMINAL COMPLAINT IN THE DISTRICT COURT

To the Justices of the District Court of Dukes County, holden at Edgartown, for the transaction of criminal business within the County of Dukes County, Michael A. Renahan of Chilmark, in the County of Dukes County; in behalf of the Commonwealth of Massachusetts on oath complains that Jack B. Westcott of 532 Land Hill Cove Road, Narragansett, Rhode Island, on the 5th day of September in the year of our Lord one thousand nine hundred and seventy-three at Gosnold aforesaid, and within the Judicial District of said Court, not being a legal resident of the Commonwealth of Massachusetts during the preceding year, did drag for fish by means of an otter trawl in that part of the waters of Vineyard Sound lying in the Town of Gosnold, and included between an imaginary line running from the extreme western point of Gay Head to the extreme western point of Nashawena Island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light, in violation of Chapter 35 of the Acts of 1923 as amended against the peace of said Commonwealth and the form of the statute in such case made and provided.

(s) Michael A. Renahan

Dukes County To Wit:
Taken and Sworn to, at Edgartown, this 7th day of September in the year of our Lord one thousand nine hundred and seventy-three

Before Said Court,
(s) Thomas A. Teller
Clerk of the District Court
of Dukes County.

[Endorsements]

9/7/73
Plea N.G.

Continuance	Oct. 19, 1973
	Nov. 16, 1973
	Feb. 15, 1974
	April 19, 1974
	April 26, 1974
* * *	* * *

Judgment	Guilty
Sentence	$500 fine
Appeal $100 PR to Spring Term	

[TITLE OMITTED IN PRINTING]

AGREED STATEMENT OF FACTS IN THE SUPERIOR COURT

1. Jack B. Westcott is the defendant in this action.

2. On September 5, 1973 Mr. Westcott was arrested by Michael Renahan, a resident of Chilmark, Massachusetts and an officer of the Department of Natural Resources of the Commonwealth of Massachusetts, for violation of Chapter 35 of the Acts of 1923 of the Commonwealth of Massachusetts, as amended, and filed a complaint against him in the District Court of Dukes County, a copy of which is attached hereto as Exhibit A. On April 26, 1974, Mr. Westcott was tried and found guilty of this violation in said District Court, and has taken an appeal to the Superior Court sitting in Dukes County.

3. On September 5, 1973 at the time of arrest, Mr. Westcott was dragging for fish, namely scup and fluke, which are migratory fish, by means of an otter trawl in a vessel owned without the Commonwealth of Massachusetts, to wit, the SUZANNE registered out of Point Judith, Rhode Island,

bearing Registry Number 290327, in the waters covered by said Chapter 35 of the Acts of 1923 of the Commonwealth of Massachusetts, as amended.

4. Mr. Westcott had not been a legal resident of the Commonwealth of Massachusetts during the year preceding September 5, 1973, or for the year preceding July 1, 1973. He was then and is now a resident of Narragansett, Rhode Island.

5. The waters described in said Chapter 35 of the Acts of 1923 of the Commonwealth of Massachusetts, as amended, are navigable waters of the United States, as likewise are the waters covered by Chapter 158 of the Acts of 1936 of the Commonwealth of Massachusetts, as amended and by Section 99 of Chapter 130 of the General Laws of the Commonwealth of Massachusetts, as amended; copies are attached as Exhibits B, C and D.

6. Mr. Westcott if called as a witness would testify that the waters covered by Chapter 35 of the Acts of 1923 of the Commonwealth of Massachusetts, as amended, (as likewise are the waters covered by Chapter 158 of the Acts of 1936 of the Commonwealth of Massachusetts, as amended, and by Section 99 of Chapter 130 of the General Laws of the Commonwealth of Massachusetts, as amended) are good areas for fishing for migratory fish, such as scup and fluke, by beam and otter trawl and his freedom to fish there throughout the year, and to carry his catch of fish out of those waters and out of any coastal waters of the Commonwealth of Massachusetts which are simultaneously navigable waters of the United States in a vessel owned without the Commonwealth of Massachusetts, and which is not a common carrier, is and would be a valuable right to him.

(s) PHILIP A. ROLLINS
District Attorney

(s) RICHARD J. MCCARRON
(s) GEORGE M. VETTER
Attorneys for the Defendant

May 14, 1974

Exhibit A to Agreed Statement of Facts

[Printed *ante* at pp. 2-4.]

Exhibit B to Agreed Statement of Facts

ACTS OF 1923: CHAPTER 35

AN ACT PROHIBITING DURING CERTAIN MONTHS OF THE YEAR THE USE BY CERTAIN PERSONS OF BEAM OR OTTER TRAWLS IN TAKING FISH FROM CERTAIN WATERS OF THE TOWNS OF CHILMARK, GAY HEAD AND GOSNOLD.

It shall be unlawful during the months of July, August and September for any person who has not been a legal resident of this commonwealth during the preceding year to use beam or otter trawls to drag for fish in that part of the waters of Vineyard Sound lying in the towns of Chilmark, Gay Head and Gosnold, and included between an imaginary line running from the extreme western point of Gay Head to the extreme point of Nashawena island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light. Violation of this act shall be punished by a fine of not less than five hundred nor more than one thousand dollars.

Exhibit C to Agreed Statement of Facts

ACTS OF 1936: CHAPTER 158

AN ACT PENALIZING THE TAKING BY CERTAIN PERSONS OF FISH BY THE OTTER TRAWL METHOD FROM A CERTAIN AREA IN VINEYARD AND NANTUCKET SOUNDS

Whoever, not being an inhabitant of this commonwealth, takes, attempts to take or assists in taking fish by the otter trawl method from so much of the waters of Vineyard and

Nantucket Sounds as lies between a line connecting Gay Head and Cuttyhunk lights and a line extending north thirteen degrees west (true bearing) from Cape Pogue light to the mainland shall be punished by a fine of not less than twenty nor more than fifty dollars.

Exhibit D to Agreed Statement of Facts

SECTION 99. CARRYING FISH OUT OF THE COMMONWEALTH IN VESSEL OR SMACK OWNED WITHOUT THE COMMONWEALTH.

Whoever, other than a common carrier, carries out of the commonwealth in any vessel or smack owned without the commonwealth any fish, except oysters, taken within the coastal waters, and whoever in any such vessel or smack takes any fish within the coastal waters for the purpose of carrying them out of the commonwealth, shall be punished by a fine of fifty dollars, and all fish so taken or carried shall be forfeited to the commonwealth and disposed of by the director for the best interests of the commonwealth. (1941, 598, §1, effective Jan. 1, 1942.)

[TITLE OMITTED IN PRINTING]

DEFENDANT'S MOTION TO DISMISS IN THE SUPERIOR COURT

Defendant Jack B. Westcott moves to dismiss the complaint on the following grounds:

1. That Chapter 35 of the Acts of 1923 of the Commonwealth of Massachusetts, as amended, violates the Privileges and Immunities Clause of Article IV, §2(1), of the

Constitution of the United States, on the ground that it totally excludes fishermen who are not residents of Massachusetts from fishing for migratory fish in certain waters as set forth in the statute which are navigable waters of the United States during the months of July, August and September, thus imposing a differential treatment between fishermen who are residents of the Commonwealth of Massachusetts and those who are not, with no possible justification for such discrimination or disparity of treatment.

2. That Chapter 35 of the Acts of 1923 of the Commonwealth of Massachusetts, as amended, violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, on the ground that it totally excludes fishermen who are not residents of Massachusetts from fishing for migratory fish in certain waters as set forth in the statute which are navigable waters of the United States during the months of July, August and September, thus imposing a differential treatment between fishermen who are residents of the Commonwealth of Massachusetts and those who are not, with no possible justification for such discrimination or disparity of treatment, such statute basing its classification upon a suspect criterion such as citizenship, which is not justified by any compelling governmental interest of the Commonwealth of Massachusetts much less any that can withstand the mandate of the Fourteenth Amendment.

3. In support of the foregoing defenses and objections, defendant cites *Toomer* v. *Witsell*, 334 U.S. 385 (1948), *Mullaney* v. *Anderson*, 342 U.S. 415 (1952), *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), and *Takahashi* v. *Fish and Game Comm'n*, 334 U.S. 410 (1948).

JACK B. WESTCOTT
By His Attorney,
(s) RICHARD J. MCCARRON

[TITLE OMITTED IN PRINTING]

REPORT OF THE SUPERIOR COURT

On September 5, 1973, the Defendant, Jack B. Westcott, was arrested by an Officer of the Department of Natural Resources for violation of Chapter 35 of the Acts of the Commonwealth of 1923 as Amended. On April 26, 1974, the Defendant was tried and found guilty of this violation in the District Court of Dukes County, and appealed said finding to the Superior Court sitting for Dukes County. On May 14, 1974, his case was called for trial in the Superior Court and at that time the Defendant filed a Motion to Dismiss, a copy of which is hereto annexed and marked Exhibit "A". At the hearing on the Motion the Commonwealth and Counsel for the Defendant submitted an Agreed Statement of Facts, a copy of which is annexed hereto and marked Exhibit "B".

At the time of Mr. Westcott's arrest on September 5, 1973, he was dragging by means of otter trawl, for migratory fish, namely scup and fluke, in a boat registered out of Point Judith, Rhode Island. It was agreed by the Commonwealth and the Defendant that at the time the Natural Resources Officer arrested him, he and his vessel were in waters of Vineyard Sound, covered by Chapter 35 of the Acts of 1923, and that the Defendant had not been a legal resident of the Commonwealth during the year preceding his arrest.

The questions presented by this report are as follows:

1. Does Chapter 35 of the Acts of 1923 as Amended violate the Privileges and Immunities Clause in Article IV §2(1) of the Constitution of the United States, by imposing differential treatment between fishermen who are residents of the Commonwealth and those who are not?

2. Does the criteria for legal residence in the Commonwealth during the preceding year as provided in Chapter 35 of the Acts of 1923 violate the Equal Protection Clause of the 14th Amendment to the Constitution of the United States?

Being of the opinion that the questions of law hereinbefore set out are so important or doubtful as to require the decision of the Supreme Judicial Court, and the Defendant consenting thereto, I report the case under G.L. c. 278 §30A so far as necessary to present the questions of law set forth herein and raised by the Defendant's Motion to Dismiss.

Respectfully submitted,
(s) AUGUST C. TAVEIRA
Associate Justice of the
Superior Court

Dated: May 23, 1974

"Exhibit A" to Report
[Printed *ante* at pp. 7-8.]

"Exhibit B" to Report
[Printed *ante* at pp. 4-7.]

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

COMMONWEALTH OF MASSACHUSETTS,
v.
JACK B. WESTCOTT.

OPINION OF THE MAJORITY OF THE JUSTICES OF THE SUPREME JUDICIAL COURT

BRAUCHER, J. Statute 1923, c. 35, as amended by St. 1962, c. 219, in effect prohibits nonresidents of Massachusetts from dragging for fish in Vineyard Sound during the months of July, August and September.[1] On the authority of *Toomer* v. *Witsell*, 334 U.S. 385 (1948), we hold that the statute violates the privileges and immunities clause of the Constitution of the United States. U.S. Const. art. IV, § 2. We do not answer the question whether the requirement of legal residence "during the preceding year" violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The defendant was arrested on September 5, 1973, by an officer of the Department of Natural Resources while en-

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[1] "It shall be unlawful during the months of July, August and September for any person who has not been a legal resident of this commonwealth during the preceding year to use beam or otter trawls to drag for fish in that part of the waters of Vineyard Sound lying in the towns of Chilmark, Gay Head and Gosnold, and included between an imaginary line running from the extreme western point of Gay Head to the extreme western point of Nashawena island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light. Violation of this act shall be punished by a fine of not less than five hundred nor more than one thousand dollars."

gaged in dragging by means of an otter trawl for scup and fluke, which are migratory fish. His vessel was registered out of Point Judith, Rhode Island, and he was and is a resident of Narragansett, Rhode Island. He had not been a legal resident of the Commonwealth during the year preceding the arrest. The arrest occurred within waters covered by the statute.

The defendant was found guilty as charged in the District Court of Dukes County. On appeal to the Superior Court, the parties submitted a statement of agreed facts. The judge reserved decision on the defendant's motion to dismiss. Under G.L. c. 278, § 30A, the judge reported the case so far as necessary to present the following questions of law, and we granted the Commonwealth's application for direct appellate review:

"1. Does Chapter 35 of the Acts of 1923 as Amended violate the Privileges and Immunities Clause in Article IV §2(1) of the Constitution of the United States, by imposing differential treatment between fishermen who are residents of the Commonwealth and those who are not?

"2. Do the criteria for legal residence in the Commonwealth during the preceding year as provided in Chapter 35 of the Acts of 1923 violate the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.?"

1. *The ownership theory.* The Commonwealth's argument as to the first question rests largely on *McCready* v. *Virginia*, 94 U.S. 391 (1876). There the Supreme Court upheld a Virginia statute prohibiting nonresidents from planting oysters in the beds of its tidewaters. The court said the States owned the beds, the tidewaters themselves, "and the fish in them, so far as they are capable of ownership while running." *Id.* at 394. The planting of oysters in tidewater beds was like the planting of corn on dry

land owned by the State; in both cases, the State could confine the use of the land to its own citizens. *Id.* at 396.

Later cases did little to reinforce the concept of ownership of migratory fish in the marginal sea. In *Manchester* v. *Massachusetts*, 139 U.S. 240, 265 (1891), a regulation of fishing in Buzzards Bay was upheld; "it was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other states." In *Missouri* v. *Holland*, 252 U.S. 416, 434 (1920) (Holmes, J.) dealing with migratory birds, the court said, "To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership."

In *Toomer* v. *Witsell*, 334 U.S. 385 (1948), a South Carolina statute discriminated against nonresidents fishing for migratory shrimp in the marginal sea. The Supreme Court held that the statute violated the privileges and immunities clause, which bars "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Id.* at 396. "The whole ownership theory, in fact," the court said, "is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Id.* at 402. The *McCready* case was distinguished as involving stationary oysters rather than free-swimming fish, and tidewaters rather than marginal sea. *Id.* at 401.

The *Toomer* case has been treated as controlling in cases like ours. *Brown* v. *Anderson*, 202 F. Supp. 96, 102-103 (D. Alas. 1962); *Gospodonovish* v. *Clements*, 108 F. Supp. 234, 237 (E.D. La. 1951), *appeal dismissed*, 344 U.S. 911 (1953). *Edwards* v. *Leaver*, 102 F. Supp. 698, 703 (D. R.I.

1952). *Russo* v. *Reed*, 93 F. Supp. 554, 559-560 (D. Me. 1950). *Steed* v. *Dodgen*, 85 F. Supp. 956, 958 (W.D. Tex. 1949). *Dobard* v. *State*, 149 Tex. 332, 342 (1950). Cf. *Mullaney* v. *Anderson*, 342 U.S. 415, 417 (1952); *Schakel* v. *State*, 513 P.2d 412, 414 (Wyo. 1973) (deer hunting). But cf. *Anderson* v. *State*, 213 Ark. 871, 875 (1948) (fishing in inland waters); *State* v. *Kemp*, 73 S.D. 458, 465 (1950), *appeal dismissed*, 340 U.S. 923 (1951) (non-resident hunters of migratory water fowl constituted "a peculiar source of evil"). Similar decisions have been made under the equal protection clause of the Fourteenth Amendment. *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410, 421 (1948) (discrimination against aliens). *Edwards* v. *Leaver*, *supra* (discrimination against corporations). The *McCready* case, if it retains any vitality, seems now to be restricted to shellfish or to tidewaters. See *State* v. *Norton*, 335 A.2d 607, 615 (Me. 1975) (clams); *Bruce* v. *Director, Dep't of Chesapeake Bay Affairs*, 261 Md. 585, 607-611 (1971) (oysters).

2. *The Submerged Lands Act of 1953.* The Commonwealth contends that the rationale of the *Toomer* case has been completely undercut by the enactment of the Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.* (1970). Section 1311(a) of that act declares that "title" to the "natural resources" within "navigable waters within the boundaries of the respective States" is vested in the respective States, and § 1301(e) defines "natural resources" to include "fish." Vineyard Sound is undoubtedly part of the navigable waters of Massachusetts. Hence, it is argued, the ownership theory rejected in the *Toomer* case has now been revived by act of Congress.

The Submerged Lands Act of 1953 was a congressional response to three Supreme Court cases: *United States* v. *Texas*, 339 U.S. 707 (1950). *United States* v. *Louisiana*, 339 U.S. 699 (1950). *United States* v. *California*, 332 U.S.

19 (1947). Those cases had held that the Federal government and not the individual coastal States had paramount rights in the marginal sea and control over the resources contained therein. "The Act merely confirmed the States' pre-existing rights . . . by, in effect, quitclaiming all federal claims thereto." *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 318 (1973). We think, in the language of the *Toomer* case, that the ownership language of the act should be read as "legal shorthand" for the "power to preserve and regulate," at least in its application to fish swimming in the ocean.

Decisions under the act have not given it any such effect as that for which the Commonwealth contends. In *Corsa* v. *Tawes*, 149 F. Supp. 771, 773 (D. Md., *aff'd*, 355 U.S. 37 (1957), the court cited the act in deciding that regulation of coastal fisheries is "within the police power of the individual states," but did not reach the problem of discrimination against nonresidents. 149 F. Supp. at 777-778. In *Kake* v. *Egan*, 174 F. Supp. 500, 502-504 (D. Alas. 1959), *aff'd sub nom. Metalakatla Indian Community, Annette Island Reserve* v. *Egan*, 362 P.2d 901, (Alas. 1961), *aff'd sub nom. Kake* v. *Egan*, 369 U.S. 60 (1962), the court cited the *Toomer* case and the act; it said that the ownership theory "has to some extent been repudiated and the modern concept contemplates that state control is founded upon the power to regulate in the state the protection of these resources [fish] for all the people." See *Glenovich* v. *Noerenberg*, 346 F. Supp. 1286, 1291-1293 (D. Alas.), *aff'd* 409 U.S. 1070 (1972). In *Brown* v. *Anderson*, 202 F. Supp. 96, 102-103 (D. Alas. 1962), a case like the present one, the State statute was held unconstitutional on the authority of the *Toomer* case, without mention of the act.

3. *Durational residence requirement.* Our conclusion that the statute violates the privileges and immunities clause makes it unnecessary to consider whether the re-

quirement of residence for one year violates the equal protection clause. See *Massey* v. *Appolonio,* 387 F. Supp. 373, 376-377 (D. Me. 1974) (three-year residence for lobstermen unconstitutional). Compare *Memorial Hosp.* v. *Maricopa County,* 415 U.S. 250, 258-260 (1974), with *Sosna* v. *Iowa,* 419 U.S. 393, 409 (1975).

4. *Disposition.* We answer the first question reported by the Superior Court "Yes." We do not answer the second question. The case is remanded to the Superior Court, where the defendant's motion to dismiss is to be allowed.

So ordered.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

COMMONWEALTH OF MASSACHUSETTS,
v.
JACK B. WESTCOTT.

OPINION OF THE DISSENTING JUSTICE OF THE SUPREME JUDICIAL COURT

REARDON, J. (dissenting). It is my view that there is no violation of the privileges and immunities clause. In *McCready* v. *Virginia,* 94 U.S. 391, 395 (1876), involving a Virginia statute prohibiting nonresidents from planting oysters in the beds of its tidewaters, it was made clear that the tidewaters themselves were owned by the States as well as the fish in them "subject to the paramount right

of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States." The court went on to say that there was no such grant of power over the fisheries which remain under the exclusive control of the State which may regulate their use, again assuming no obstruction of navigation.

The *McCready* case was followed by *Toomer* v. *Witsell,* 334 U.S. 385 (1948), involving a South Carolina statute which provided for an extremely expensive license fee on nonresidents fishing for migratory shrimp within the three-mile maritime belt (the marginal sea) off the coast of that State. In the *Toomer* case the court distinguished the *McCready* case on the grounds that (1) *McCready* was concerned with the taking of oysters which are essentially stationary while the *Toomer* case involved the taking of free-swimming fish; and (2) the ownership rights of the States in the marginal sea are different from their rights in their tidewaters. 334 U.S. at 401.

The *Toomer* case was followed by the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.* (1970).[1] As the

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[1] The following sections are of importance:
§ 1301. "Definitions.

. . .

"(a) The term 'lands beneath navigable waters' means—(1) all lands within the boundaries of each of the respective States which are covered by non-tidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modied by accretion, erosion, and reliction."

"(c) The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."

"(e) The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not

majority opinion recognizes: "The Submerged Lands Act of 1953 was a congressional response to three Supreme Court cases: *United States* v. *Texas*, 339 U.S. 707 (1950). *United States* v. *Louisiana*, 339 U.S. 699 (1950). *United States* v. *California*, 332 U.S. 19 (1947). Those cases had held that the Federal government and not the individual

include water power, or the use of water for the production of power."

§ 1311. "Rights of the States.

"(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use.

"It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof."

§ 1312. "Seaward boundaries of States.

"The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted sebsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

coastal States had paramount rights in the marginal sea and control over the resources contained therein." *Ante* at [a] As the legislative history makes clear, both the Senate and House committees which favorably reported the bill[2] considered the holdings of these three cases a usurpation by the Federal government of what had been perceived as the States' traditional rights of ownership and control in this area. H.R. Rep. No. 215, 83d Cong., 1st Sess. 15, 34-53 (1953). S. Rep. No. 133, 83d Cong. 1st Sess. 6-8, 54-74 (1953) (1953 U.S. Code Cong. & Ad. News 1385, 1399, 1417-1437, 1479-1481, 1505-1526). Congress sought to remedy this situation through the Submerged Lands Act, the purpose of which was to establish and confirm the claims and rights of the respective States to the lands beneath the marginal seas and the resources within such lands and water, by conveying to the States whatever rights the Federal government had in those lands and resources. H.R. Rep. No. 215, *supra* at 5. S. Rep. No. 133, *supra* at 5. That a proprietary right was conveyed to the States was confirmed in *Alabama* v. *Texas*, 347 U.S. 272 (1954), in which the Supreme Court upheld the constitutionality of the act as a proper exercise of Congress' power "to dispose of . . . Property belonging

§ 1314. "Rights and powers retained by the United States; purchase of natural resources; condemnation of lands.

"(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title."

[a] Mass. Adv. Sh. (1976) at .

[2] The Committee on the Judiciary in the House and the Committee on Interior and Insular Affairs in the Senate.

to the United States" under Article IV, § 3, cl. 2, of the United States Constitution.

Since "fish" are included among the "natural resources," "title to and ownership of" which have been vested in the States (43 U.S.C. § 1301(e) and § 1311[a][1] [1970]), it would appear that the act intends that the States shall possess the same ownership rights in migratory fish swimming in waters within the three-mile limit as they possess with respect to tidewater fish. In effect the Submerged Lands Act squares the present case with the *McCready* case. The two grounds which were used to distinguish *McCready* in the *Toomer* case are no longer pertinent.

The majority opinion marshals a large number of cases in support of its proposition that "[t]he *Toomer* case has been treated as controlling in cases like ours." *Ante* at .[b] However, all but two of those cases were decided prior to the passage of the Submerged Lands Act in 1953. Of the two post-1953 cases one is concerned with deer hunting in Wyoming (*Schakel* v. *State*, 513 P.2d 412, 414 [Wyo. 1973]), and the other is an Alaskan Federal district court case which does not discuss the impact of the act (*Brown* v. *Anderson*, 202 F. Supp. 96, 102, 103 [D. Alas. 1962]). Had the Submerged Lands Act not intervened, the cases cited by the majority opinion would be instructive. However, since the outcome of the present case turns on the act and its interpretation, I do not find cases decided before the act became law to be especially relevant authority. For similar reasons I do not consider cases dealing with deer hunting, an activity to which the act clearly does not apply, nor cases which do not even consider the impact of the act on fishing rights, to be useful precedents for resolving the issue now before us.

[b] Mass. Adv. Sh. (1976) at .

The majority opinion when it does turn to the Submerged Lands Act dismisses its impact with the statement: "We think, in the language of the *Toomer* case, that the ownership language of the act should be read as 'legal shorthand' for the 'power to preserve and regulate,' at least in its application to fish swimming in the ocean." *Ante* at .[c] The opinion does not develop why the clear language of the statute should be given such a construction contrary to its plain meaning. Section 1311(a)(1) establishes in the States "title to and ownership of" natural resources, including fish, within the three-mile limit; § 1311(a)(2) deals with "the right and power to manage" said resources. The legislative history indicates that the rights of ownership and the rights of management were placed in separate clauses and made independent of one another in order to preserve under the separability clause (Submerged Lands Act of 1953, c. 65, Tit. II, § 11, 67 Stat. 33) the latter powers should the conveyance of title and ownership be eventually ruled unconstitutional. S. Rep. No. 133, *supra* at 13, 19; pt. 2, 9-10, 13-14 (1953 U.S. Code Cong. & Ad. News 1486, 1495, 1543, 1546-1547). However, the United States Supreme Court in *Alabama* v. *Texas*, *supra*, upheld the constitutionality of the conveyance of "title to and ownership of" the lands and resources described in the act. By construing the ownership language of § 1311(a)(1) to mean no more than the management and regulation language of § 1311(a)(2), this court today essentially reads the former section out of the statute. Even a cursory reading of the legislative history indicates that the Congress was well aware that § 1311(a)(1) was concerned with an *ownership* interest in the ordinary sense of the word and not merely a power to preserve and regulate. H.R. Rep. No. 215, *supra* at 5-6, 15, 24-47. S. Rep. No. 133, *supra*

[c] Mass. Adv. Sh. (1976) at .

at 5, 54-68 (1953 U.S. Code Cong. & Ad. News 1385, 1388-1389, 1399, 1417-1431, 1479, 1505-1520). Given the language and the structure of the statute, the legislative history, and the decision in *Alabama* v. *Texas, supra*, I can discern no justification for a statutory construction which renders the ownership language of § 1311(a)(1) a nullity, an empty congressional exercise, with respect to fish.

Of course, it still may be argued that even conceding that the Commonwealth has ownership rights in the fish within its three-mile limit, the privileges and immunities clause prohibits the Commonwealth from exercising those property rights in such manner as to exclude nonresident fishermen; and perhaps this is what the majority intended in their treatment of the ownership language of the act. However, this position would in effect overrule the *McCready* case. While there is language in the *Toomer* case (334 U.S. at 401-402), questioning the viability of *McCready*, I would not be inclined to follow that path. Such language is not only dictum but was written at a time when the Supreme Court was clearly of opinion that the States did not possess any proprietary interests in the marginal sea. See *United States* v. *Texas*, 339 U.S. 707 (1950): *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *California*, 332 U.S. 19 (1947). Congress, through the passage of the Submerged Lands Act, has so altered the nature of the States' interests in the marginal sea and the resources therein, including fish, that this dictum in the *Toomer* case, whatever its vitality at the time, is not a reliable guide to current Federal law.

While Congress of course could not overrule *Toomer's* resolution of the constitutional issue, it could, and I think did, alter the premises on which the decision was based. The basic assumptions which animated the Court's analysis in *Toomer* (as well as in the other cases of that time dealing with the rights of the States in the marginal sea)

were the objects of congressional attention in the Submerged Lands Act. The dictum in *Toomer* alluded to above was clearly based on an opinion that State property interests in the resources in the marginal sea did not exist, and were but "fiction[s]" and "legal shorthand" (334 U.S. at 402).

Finally, while the majority do not rely on this argument, it is strenuously advanced by the defendant that whatever the status of the State's ownership interests in the migratory fish within the marginal sea, the legislative history of the act, particularly portions of the debates in the House of Representatives, indicates that Congress did not intend to confer on the States the power to exclude out-of-State fishermen.[3] On the floor of the House, Mr. Colmer offered two amendments which would have prohibited unreasonable discrimination by a State in favor of its own citizens (as compared with citizens of other States) in the control and use of "national resources" in the first amendment, and the control, use, licensing, and taking of "fish, shrimp, and other migratory marine animal life" in the second amendment. 99 Cong. Rec. 2563-2564 (1953).[4] Both amend-

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[3] The debates in the House focused primarily on the rights to the oil and gas reserves under the marginal sea rather than on the question of fishing rights. However, on a number of occasions members did address themselves to fishing problems recognizing that the ownership of fish, as well as that of other natural resources, was to be conveyed to the States by the bill. See 99 Cong. Rec. 2488 (1953) (remarks of Mr. Colmer and of Mr. Celler); 2499 (remarks of Mr. Nicholson); 2583 (remarks of Mr. Williams).

[4] The first amendment read: "On page 6, line 4, after the words 'natural resources', insert the following: 'subject to the condition that there shall be no unreasonable disparity between the treatment by a State or its grantees of its citizens and the treatment by such State or its grantees of the citizens of another State in the management, administration, leasing, controlling, developing, and use of the said national resources.' " 99 Cong. Rec. 2563 (1953).

The second amendment read: "On page 6, line 4, after the words 'State resources', insert 'subject to the condition that there shall be no unreasonable disparity between the treatment by a State or its grantees of its citizens and the treatment by such

ments were defeated. In the debate on the first amendment, Mr. Graham, chairman of the subcommittee which had held hearings on the bill,[5] stated that in his opinion the amendment was unnecessary given the Supreme Court's holding in the *Toomer* case. 99 Cong. Rec. 2563 (1953). However, in the debate on the second amendment Mr. Graham stated, "[I]t has always been my understanding that anything of a migratory nature, like migratory birds and such, must be settled by treaty or compact. This whole matter can be settled as between the States of Mississippi and Louisiana or between the States south thereof by a compact." 99 Cong. Rec. 2564 (1953). Of course if the content of Mr. Colmer's second amendment were already the law of the land or implicitly incorporated into the act, there would be no need for the compacts between the States referred to by Mr. Graham in urging the defeat of the amendment. The defendant places substantial reliance on what are simply the self-serving remarks of the proponent of the defeated amendments. In short, the legislative history on this point is ambiguous and inconclusive and does not compel the statutory interpretation the defendant advances.

I would conclude that the Submerged Lands Act establishes, conveys and vests an ownership in the States in the migratory fish within the marginal sea. Construing the statute in light of the *McCready* case demonstrates the propriety and constitutionality of the prohibition of nonresidents from fishing in those Massachusetts waters which St. 1923, c. 35, provides. The net effect of the Federal act and the *McCready* case is to establish a property right

State and its grantees of the citizens of another State in the management, administration, controlling, use, licensing, and taking of fish, shrimp, and other migratory marine animal life.' " 99 Cong. Rec. 2563-2564 (1953).

[5] Subcommittee No. 1 (Immigration and Nationality) of the Committee on the Judiciary.

in that three-mile limit which the State can protect as it has done in this instance. There is thus no violation of the privileges and immunities clause.

The wisdom of the policies expressed in the Submerged Lands Act and in St. 1923, c. 35, is not the issue before us. Perhaps the Submerged Lands Act was not a wise piece of legislation. There were certainly many in Congress who expressed such a view (see H.R. Rep. No. 215, *supra* at 58-60, 80-101, 114-124; S. Rep. No. 133, pt. 2, *supra* at 1-53 [1953 U.S. Code Cong. & Ad. News 1439-1473; 1534-1588]); and President Truman vetoed similar legislation twice (92 Cong. Rec. 10660 [1946]; 98 Cong. Rec. 6251 [1952]). But Congress persisted and did pass the act which was signed into law in 1953 by President Eisenhower. Act of May 22, 1953, Pub. L. No. 31, 67 Stat. 29. As for St. 1923, c. 35, perhaps a more "enlightened" course for Massachusetts would be to allow nonresidents to utilize its resources as freely as its own residents do. However, the Legislature has not arrived at this judgment, and I do not think in the circumstances presented by this case it was constitutionally compelled to do so.

I would conclude also that the statutory classification based on residency in Massachusetts does not constitute a violation of the equal protection clause. As discussed above, the Commonwealth has an ownership interest in the fish within its coastal waters out to the three-mile limit. "For this purpose the . . . [Commonwealth] represents its people, and the ownership is that of the people in their united sovereignty." *McCready* v. *Virginia*, *supra* at 394. See *Toomer* v. *Witsell*, *supra* at 408 (Frankfurter, J., concurring); *Maine* v. *M/V Tamano*, 357 F. Supp. 1097, 1100-1101 (D. Me. 1973). In this context there is a valid legislative purpose in preserving for the residents of the Commonwealth the fishing resources within its territorial waters; and the exclusion of out-of-State fishermen cannot

be deemed arbitrary, capricious, irrational, or an invidious discrimination.

The facts of the present case do not provide an occasion to treat the durational aspect of the residency requirement of St. 1923, c. 35. The defendant is not a resident of Massachusetts, the record contains no indication that he desired to be a resident, and the requirement of one year's residency in no way brought the defendant within the terms of the statute or increased his liability thereunder. Successful challenges to durational residency requirements have involved citizens of the State in which those challenges occurred. See, e.g., *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

I would thus conclude that St. 1923, c. 35, is constitutional as applied against the defendant.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

COMMONWEALTH OF MASSACHUSETTS
v.
JACK B. WESTCOTT

JUDGMENT OF THE SUPREME JUDICIAL COURT

We answer the first question "Yes." We do not answer the second question. The case is remanded to the Superior Court, where defendant's motion to dismiss is to be allowed.

Supreme Court, U. S.
FILED
JUL 7 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-1775.

THE COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,
v.
JACK B. WESTCOTT,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief for Respondent in Opposition.

GEORGE M. VETTER, JR.,
HINCKLEY, ALLEN, SALISBURY & PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.
(401) 274-2000

Of Counsel:

NANCY HALL MCMILLEN,
HINCKLEY, ALLEN, SALISBURY & PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.

THOMAS D. BURNS,
BURNS & LEVINSON,
45 School Street,
Boston, Massachusetts 02108.

RICHARD J. MCCARRON,
MCCARRON & TARLOW,
Main Street,
Edgartown, Massachusetts 02539.

BATEMAN & SLADE, INC. BOSTON, MA.

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In the Supreme Court of the United States.

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No. 75-1775.

THE COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JACK B. WESTCOTT,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief for Respondent in Opposition.

Opinions Below.

The opinion and dissenting opinion of the Supreme Judicial Court are reported at Massachusetts Advance Sheets (1976) 696 through 716 and printed in petitioner's appendix A-1 through A-16.

Jurisdiction.

The petition states the jurisdictional requisites.

Question Presented.

Does a Massachusetts statute which forbids any person who has not been a legal resident of the Commonwealth for one year from dragging for migratory fish by beam or otter trawls in the coastal waters of Vineyard Sound during July, August, and September, draw a distinction between nonresidents and residents that violates the privileges and immunities clause or equal protection clause, or both, of the Constitution?

Statute Involved.

Act of February 20, 1923, c. 35, [1923] Mass. Acts and Resolves 17, *as amended by* Act of March 13, 1962, c. 219, [1962] Mass. Acts and Resolves 107.

> It shall be unlawful during the months of July, August and September for any person who has not been a legal resident of this commonwealth during the preceding year to use beam or otter trawls to drag for fish in that part of the waters of Vineyard Sound lying in the towns of Chilmark, Gay Head and Gosnold, and included between an imaginary line running from the extreme western point of Gay Head to the extreme western point of Nashawena Island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light. Violation of this act

> shall be punished by a fine of not less than five hundred nor more than one thousand dollars.

Statement.

On September 5, 1973, Jack B. Westcott was arrested while dragging for scup and fluke by otter trawl in waters covered by the statute. Scup and fluke are migratory fish. The waters are navigable waters of the United States and coastal waters of Massachusetts.

At the time of his arrest Westcott was a resident of Point Judith, Rhode Island. He had not been a Massachusetts resident during the year preceding his arrest or the interdicted season. His boat, the SUZANNE, was registered out of Point Judith. It was owned without the Commonwealth.

On April 24, 1974, Westcott was tried and found guilty by the District Court of Dukes County. He appealed to the Superior Court.

On May 14, 1974, he moved to dismiss the action on the grounds that the statute violated the privileges and immunities and equal protection clauses of the Constitution. The parties submitted an agreed statement of facts on the motion (Respondent's Appendix, pp. 1-2).

On May 23, 1974, the Superior Court reported the question of law to the Supreme Judicial Court.

On March 12, 1976, the Supreme Judicial Court held that the statute violated the privileges and immunities clause, and directed the Superior Court to grant the motion to dismiss.

Argument.

I.

The Decision of the Supreme Judicial Court is Correct.

The Supreme Judicial Court based its decision upon *Toomer* v. *Witsell*, 334 U.S. 385 (1948). It rejected the Commonwealth's argument that the Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.* (the Act), had overruled that case and had reinstated the ownership theory of *McCready* v. *Virginia*, 94 U.S. 391 (1876). This holding is correct.

In *McCready*, a Virginia statute prohibited nonresidents from planting oysters in the beds of its tidewaters. The Court upheld the statute on the theory that the state owned the beds, the tidewaters, " . . . and the fish in them, so far as they are capable of ownership while running." 94 U.S. at 394.

In *Toomer*, a South Carolina statute excluded nonresidents from fishing for migratory shrimp in the marginal sea. The court held that the statute violated the privileges and immunities clause because it discriminated against citizens of other states for no substantial reason other than that they were citizens of other states. The court said in substance that a state cannot own free-swimming fish in the marginal sea. It characterized the ownership theory as legal shorthand for the power of a state " . . . to preserve and regulate the exploitation of an important resource." 334 U.S. at 402.

The Commonwealth's case in the Supreme Judicial Court turned upon two sections of the Submerged Lands Act. Section 1311(a) of the Act declares that "title" to the "natural resources" within "navigable waters within the boundaries of the respective States" is vested in the respective states. Section 1301(e) defines "natural resources" to include "fish."

The Commonwealth argued the Act thus vested ownership in the state of free-swimming fish in the marginal sea and overruled the holding in *Toomer*. Consequently, the Commonwealth concluded, since Vineyard Sound is a navigable water of Massachusetts, and since it owns the fish in those waters, it can prohibit nonresidents from fishing for these fish under the ownership theory of *McCready*.

The Commonwealth makes the same argument in its petition for certiorari.

The Supreme Judicial Court properly held that the Act does not have the effect the Commonwealth says that it does.

"The Act merely confirmed the States' pre-existing rights . . . by, in effect, quitclaiming all federal claims thereto." *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 318 (1973).

Since *Toomer* predates the Act, it holds by necessary implication that prior to the Act the state had no ownership right in free-swimming fish in the marginal sea. The states did not have a preexisting right that could be confirmed by the Act.

The gist of *Toomer* is that free-swimming fish like free-flying birds cannot be owned in the wild. See, *Missouri* v. *Holland*, 252 U.S. 416, 434 (1920). The federal government did not have an ownership right which by the Act it could quitclaim to the states.

The ownership theory no longer underpins the power of a state to regulate its natural resources. Under modern thinking that power is part of the police power of the states. See, *Corsa* v. *Tawes*, 149 F. Supp. 771 (D. Md.), *aff'd*, 355 U.S. 37 (1957); *Kake* v. *Egan*, 174 F. Supp. 500, 502-504 (D. Alas. 1959), *aff'd sub nom. Metlakatla Indian Community, Annette Island Reserve* v. *Egan*, 362 P. 2d 901 (Alas. 1961), *aff'd sub nom. Kake* v. *Egan*, 369 U.S. 60 (1962). The ownership language in the Act should thus be read as "legal shorthand" for that power, at least in its application to fish swimming in the ocean.

The Commonwealth's reading of the Act would overrule the long line of cases following *Toomer*, and *Missouri* v. *Holland*, *supra*, or based upon their underlying concepts. See the opinion of the Supreme Judicial Court (Petitioner's Appendix A-3 and A-4).

The Commonwealth's position would lead to strange results. Free-flying birds above Vineyard Sound could not be owned, whereas free-swimming fish in Vineyard Sound could be. What then about flying fish, or diving birds?

The legislative history of the Act makes clear that the Congress did not intend the Act to overrule *Toomer*. 99 Cong. Rec. pp. 2563-2564 (1953) (Respondent's Appendix, pp. 7-14).

II.

There are No Conflicts in the Decisions of the Circuit Courts.

There is no conflict in the Circuit Courts about applying the decisions in *Toomer*, and *Missouri* v. *Holland*, *supra*.

There is no conflict in the Circuit Courts about the effect of the Submerged Lands Act on the point raised by the Commonwealth.

III.

The Question is Not Important and will Not Affect Others.

The Commonwealth says that twenty-two other statutes of nine states differentiate between the rights of residents and

nonresidents to take fish in coastal waters. This is the basis for two arguments.

The first argument is that the decision of the Supreme Judicial Court involves a novel federal question and would have a substantial *stare decisis* effect on these other statutes, such that this Court and not a state court should make the determination. There are three answers to this argument.

Prior decisions of this Court, not the decision of the Supreme Judicial Court, furnish the precedent.

If these other statutes come under constitutional attack, the courts can readily pass upon their constitutionality under *Toomer*. The law is so clear that a decision in this case would add nothing.

The only new point raised by the Commonwealth is the peculiar effect of the Submerged Lands Act for which it argues. That point may be novel but it is not substantial.

The second argument is that these other statutes suggest an equal protection as well as a privileges and immunities question. The Commonwealth says that *Douglas* v. *Seacoast Products, Inc.*, U.S.S.C. No. 75-1255, probable jurisdiction noted April 26, 1976, raises the first but not the second question so that *certiorari* should be granted in this case to round out the subject. There are two answers to this argument.

It is not clear that this Court necessarily noted probable jurisdiction in the *Douglas* case because of the equal protection question. That case also raises serious questions about preemption and abstention, either or both of which could be the reason for the noting of probable jurisdiction.

The only question in this case is the effect of the Submerged Lands Act. To the extent that that is a valid or substantial question, it can be answered completely in the *Douglas* case.

Conclusion.

The petition for certiorari should be denied.

Respectfully submitted,

GEORGE M. VETTER, JR.,
HINCKLEY, ALLEN, SALISBURY
& PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.
(401) 274-2000

Of Counsel:

NANCY HALL McMILLEN,
HINCKLEY, ALLEN, SALISBURY & PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.

THOMAS D. BURNS,
BURNS & LEVINSON,
45 School Street,
Boston, Massachusetts 02108.

RICHARD J. McCARRON,
McCARRON & TARLOW,
Main Street,
Edgartown, Massachusetts 02539.

Dated: June 6, 1976

Appendix.

COMMONWEALTH OF MASSACHUSETTS.

COUNTY OF DUKES, ss. SUPERIOR COURT.
No. 1530.

COMMONWEALTH OF MASSACHUSETTS
vs.
JACK B. WESTCOTT.

Agreed Statement of Facts.

1. Jack B. Westcott is the defendant in this action.

2. On September 5, 1973 Mr. Westcott was arrested by Michael Renahan, a resident of Chilmark, Massachusetts and an officer of the Department of Natural Resources of the Commonwealth of Massachusetts, for violation of Chapter 35 of the Acts of 1923 of the Commonwealth of Massachusetts, as amended, and filed a complaint against him in the District Court of Dukes County, a copy of which is attached hereto as Exhibit A. On April 26, 1974, Mr. Westcott was tried and found guilty of this violation is said District Court, and has taken an appeal to the Superior Court sitting in Dukes County.

3. On September 5, 1973 at the time of arrest, Mr. Westcott was dragging for fish, namely scup and fluke, which are migratory fish, by means of an otter trawl in a vessel owned without the Commonwealth of Massachusetts, to wit, the SUZANNE registered out of Point Judith, Rhode Island, bearing Registry Number 290327, in the waters covered by said Chapter 35 of the Acts of 1923 of the Commonwealth of Massachusetts, as amended.

4. Mr. Westcott had not been a legal resident of the Commonwealth of Massachusetts during the year preceding September 5, 1973, or for the year preceding July 1, 1973. He was then and is now a resident of Narragansett, Rhode Island.

5. The waters described in said Chapter 35 of the Acts of 1923 of the Commonwealth of Massachusetts, as amended, are navigable waters of the United States, as likewise are the waters covered by Chapter 158 of the Acts of 1936 of the Commonwealth of Massachusetts, as amended and by Section 99 of Chapter 130 of the General Laws of the Commonwealth of Massachusetts, as amended; copies are attached as Exhibits B, C and D.

6. Mr. Westcott if called as a witness would testify that the waters covered by Chapter 35 of the Acts of 1923 of the Commonwealth of Massachusetts, as amended, (as likewise are the waters covered by Chapter 158 of the Acts of 1936 of the Commonwealth of Massachusetts, as amended, and by Section 99 of Chapter 130 of the General Laws of the Commonwealth of Massachusetts, as amended) are good areas for fishing for migratory fish, such as scup and fluke, by beam and otter trawl and his freedom to fish there throughout the year, and to carry his catch of fish out of those waters and out of any coastal waters of the Commonwealth of Massachusetts which are simultaneously navigable waters of the United States in a vessel owned without the Commonwealth of Massachusetts, and which is not a common carrier, is and would be a valuable right to him.

PHILIP A. ROLLINS,
District Attorney.

GEORGE M. VETTER,
Attorneys for the Defendant.

May 14, 1974

DUKES COUNTY, ss. 19

I arrested the within named Defendant without a warrant on the A.D. 19 and have h in Court.

No. 20637

COMMONWEALTH WITNESSES
On Complaint Of

Michael A. Renahan

Jack B. Westcott
COMPLAINT
Chap. 35 Acts 1923
dragging for fish in closed waters

9-7-73
Plea N.G.
Continuance Oct. 19, 1973
Nov. 16, 1973
75 Feb. 74
April 19, 1974
April 20, 1974
Recognizance
Judgment Guilty
Sentence $500 fine

Appeal $100 PR to Spring Term

Def. found not/Indigent
_____Appointed
to represent defendant.

EXHIBIT A.

TO THE JUSTICES OF THE DISTRICT COURT OF DUKES COUNTY, holden at Edgartown, for the transaction of criminal business within the County of Dukes County.

Michael A. Renahan of Chilmark, in the County of Dukes County; in behalf of the COMMONWEALTH of MASSACHUSETTS on oath complains that Jack B. Westcott of 532 Land Hill Cove Road, Narraganset, R. I. on the 5th day of September in the year of our Lord one thousand nine hundred and seventy-three at Gosnold aforesaid, and within the Judicial District of said Court, not being a legal resident of the Commonwealth of Massachusetts during the preceeding year, did drag for fish by means of an otter trawl in that part of the waters of Vineyard Sound lying in the Town of Gosnold, and included between an imaginary line running from the extreme western point of Gay Head to the extreme western point of Nashawena Island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light, in violation of Chapter 35 of the Acts of 1923 as amended against the peace of said Commonwealth and the form of the statute in such case made and provided.

MICHAEL A. RENAHAN.

DUKES COUNTY TO WIT:

TAKEN AND SWORN TO, at Edgartown, this 7th day of September in the year of our Lord one thousand nine hundred and seventy-three BEFORE SAID COURT.

THOMAS A. TELLER,
Clerk of the District Court of Dukes County.

EXHIBIT B.

ACTS OF 1923: CHAPTER 35.

AN ACT PROHIBITING DURING CERTAIN MONTHS OF THE YEAR THE USE BY CERTAIN PERSONS OF BEAM OR OTTER TRAWLS IN TAKING FISH FROM CERTAIN WATERS OF THE TOWNS OF CHILMARK, GAY HEAD AND GOSNOLD.

It shall be unlawful during the months of July, August and September for any person who has not been a legal resident of this commonwealth during the preceding year to use beam or otter trawls to drag for fish in that part of the waters of Vineyard Sound lying in the towns of Chilmark, Gay Head and Gosnold, and included between an imaginary line running from the extreme western point of Gay Head to the extreme western point of Nashawena island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light. Violation of this act shall be punished by a fine of not less than five hundred nor more than one thousand dollars. (As amended, St. 1962, c. 219.)

EXHIBIT C.

ACTS OF 1936: CHAPTER 158.

AN ACT PENALIZING THE TAKING BY CERTAIN PERSONS OF FISH BY THE OTTER TRAWL METHOD FROM A CERTAIN AREA IN VINEYARD AND NANTUCKET SOUNDS.

Whoever, not being an inhabitant of this commonwealth, takes, attempts to take or assists in taking fish by the otter

trawl method from so much of the waters of Vineyard and Nantucket sounds as lies between a line connecting Gay Head and Cuttyhunk lights and a line extending north thirteen degrees west (true bearing) from Cape Pogue light to the mainland shall be punished by a fine of not less than twenty nor more than fifty dollars.

EXHIBIT D.

SECTION 99. Carrying Fish Out of the Commonwealth in Vessel or Smack Owned Without the Commonwealth.

Whoever, other than a common carrier, carries out of the commonwealth in any vessel or smack owned without the commonwealth any fish, except oysters, taken within the coastal waters, and whoever in any such vessel or smack takes any fish within the coastal waters for the purpose of carrying them out of the commonwealth, shall be punished by a fine of fifty dollars, and all fish so taken or carried shall be forfeited to the commonwealth and disposed of by the director for the best interests of the commonwealth. (1941, 598, § 1, effective Jan. 1, 1942.)

Addendum.

99 CONG. REC., PP. 2563-2564 (1953).

MR. COLMER. Mr. Chairman, I offer an amendment.

The Clerk read as follows.

Amendment offered by MR. COLMER: On page 6, line 4, after the words "natural resources", insert the following: "subject to the condition that there shall be no unreasonable disparity between the treatment by a State or its grantees of its citizens and the treatment by such State or its grantees of the citizens of another State in the management, administration, leasing, controlling, developing, and use of the said national resources."

MR. COLMER. Mr. Chairman, on yesterday I addressed the House briefly on this subject, giving advance notice that I proposed to offer this amendment. In the brief time that I have, of course, I cannot go too much into the reasons and the need for this amendment. But the amendment is aimed at one thing and one thing alone. That is to reassert in this legislation what is already considered to be the law with reference to the use and taking of fish, shrimp, and other migratory marine life. Under section 2 of article 4 of the Constitution, there can be no disparagement in the way of treatment among citizens of one State against citizens of another State. We have had in this country, and particularly in my section, a great deal of confusion and chaos, particularly with reference to shrimp boats going from the waters of one state to the waters of another State. Sometimes attempts have been made to pass unreasonable laws requiring exorbitant licenses of the citizens of one State who may want to go into the waters of another State.

MR. WILLIS. Mr. Chairman, will the gentleman yield?

MR. COLMER. I yield.

MR. WILLIS. The gentleman is familiar with the Supreme Court decision involved in the Carolina situation with reference to shrimping. I understand his amendment goes no further than to simply spell out in this bill what the gentleman thinks the Supreme Court held in the matter of licenses and so on for shrimping and for the fishing industry as against one State vis-a-vis another State.

MR. COLMER. I thank my friend for his contribution. Our States adjoin and he knows of the problem there. My amendment merely spells out what the Constitution provides and what the Supreme Court in the South Carolina case, to which my friend referred, announced to be the law. The purpose of this — if you ask why we should have this amendment written into this bill — is to dispel any idea that this tidelands law under the broad terms of this bill with reference to resources would give one State the right to discriminate against the citizens of another State. I hope my friends, the chairman of the committee and of the subcommittee, will see fit to accept this amendment.

MR. CELLER. Mr. Chairman, will the gentleman yield?

MR. COLMER. I yield.

MR. CELLER. Does the State of Louisiana allow citizens of Mississippi to fish in Louisiana waters and vice versa. What is the need of the amendment then, if that is so?

MR. COLMER. I do not want to get into any argument here because there has been extreme controversy between the two States. Not only between those two States but between other States as well. For instance North Carolina and South Carolina and also between Texas and Louisiana and other States which I might mention. Two cases have gone to the Supreme Court. We want to spell out here that this does not grant any additional authority, or attempt to grant any additional authority. That is the purpose of this amendment. I cannot see why there should be any objection to it.

As I pointed out yesterday, migratory fish recognize no artificial boundaries. They travel in the open waters, and as I illustrated in my talk yesterday, there was a gigantic school of shrimp miles square, which was discovered off the coast of Florida about a year and a half ago. That school of shrimp was converged upon by boats from Virginia on the east and Texas on the west. These fishermen from the different States followed the shrimp as they slowly migrated across the waters of Florida, Alabama, Mississippi, Louisiana, and Texas and into the waters of Mexico.

THE CHAIRMAN. The time of the gentleman has expired.

MR. GRAHAM. Mr. Chairman, I rise in opposition to the amendment.

In the first place, Mr. Chairman, the words are entirely superfluous in view of the decision of the Supreme Court. In *Toomer* v. *Witsell* (334 U.S. 385, 393 (1947)), Mr. Justice Vinson, in the majority opinion, said:

In the court below *United States* v. *California* (332 U.S. 19 (1947)) was relied upon for this proposition. Here appellants seem to concede, and correctly so, that such is neither the holding nor the implication of that case; for in deciding that the United States, where it asserted its claim, had paramount rights in the 3-mile belt, the court pointedly quoted and supplied emphasis to a statement in *Skiriotes* v. *Florida* (313 U.S. 69, 75 (1941)).

Our position is that this matter is settled. This is a proposition which could not lead to discrimination on the part of one State against the others and thus open the door to endless litigation. We are opposed to it and ask that the amendment be defeated.

MR. COLMER. Mr. Chairman, will the gentleman yield?

MR. GRAHAM. I yield.

MR. COLMER. I did not get the citation of the case the gentleman read. Was that the South Carolina case?

MR. GRAHAM. That is the South Carolina case, the shrimp-boat case.

MR. COLMER. As I understand the gentleman — and I did not get everything he said —

MR. GRAHAM. I said it was the shrimp-boat case.

MR. COLMER. Of course the main thing I caught were the very unpleasant words that the gentleman rose in opposition, but I did not get the citation.

MR. GRAHAM. I said when the shrimp boats come in in South Carolina.

MR. COLMER. Now, if I understand the gentleman correctly, he takes the position that the provisions of my amendment are already in the law.

MR. GRAHAM. That is right; that is correct.

MR. COLMER. And there is no necessity for this. Then I asked the gentleman what objection there may be to a restatement of it here.

MR. GRAHAM. Just the same as we would not restate the Constitution; that is the law.

MR. COLMER. But the gentleman must realize that it would have a very powerful and deterrent effect upon these intrastate squabbles that have arisen in the past. I regret that the gentleman sees it necessary to oppose this amendment.

MR. GRAHAM. May I say to the gentleman from Mississippi [MR. COLMER] that our position is that the Constitution, of course, is superior to any law of any State, and that has already been decided, and the Supreme Court held as I have indicated. We think it is redundancy, unnecessary, and could serve no good purpose.

MR. MCCARTHY. Mr. Chairman, will the gentleman yield?

MR. GRAHAM. I yield.

MR. MCCARTHY. I think it important that we give attention to this amendment, because it does, I think, draw a line which may save us some trouble in the future. Right now

Minnesota is having trouble with South Dakota with regard to migratory birds. The South Dakotans refuse to let us hunt in South Dakota, and we do not know whether the Supreme Court will sustain us or not, but a provision such as this would have saved us the trouble that our duck hunters are experiencing.

MR. GRAHAM. But that is a matter of intrastate and interstate concern and does not apply to foreign waters.

MR. MCCARTHY. These will be interstate waters once the boundaries have been redefined.

MR. GRAHAM. Not altogether, no; there will be the broad ocean also.

THE CHAIRMAN. The question is on the amendment offered by the gentleman from Mississippi [MR. COLMER].

The question was taken; and on a division (demanded by MR. COLMER) there were — ayes 32, noes 77.

So the amendment was rejected.

MR. COLMER. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by MR. COLMER: On page 6, line 4, after the words "State resources," insert "subject to the condition that there shall be no unreasonable disparity between the treatment by a State or its grantees of its citizens and the treatment by such State and its grantees of the citizens of another State in the management, administration, controlling, use, licensing, and taking of fish, shrimp, and other migratory marine animal life."

MR. GRAHAM. Mr. Chairman, I make the point of order that the amendment is not in order because it is merely the same amendment offered at another place.

MR. COLMER. Mr. Chairman, may I be heard on the point of order?

THE CHAIRMAN. The Chair will hear the gentleman briefly.

MR. COLMER. Mr. Chairman, we disagree with the learned gentleman from Pennsylvania. The first amendment offered went to the whole question of resources affected; oil, minerals, and other matters. This merely goes to fish, shrimp, and other migratory marine life. I hope that the distinguished chairman of the committee will accept this amendment.

THE CHAIRMAN. The Chair believes that the amendment is different in wording; therefore overrules the point of order.

MR. COLMER. Mr. Chairman, of course, I realize what we are up against here today. I am not going to term it steamrollering as has been charged here today, but it is no different from any other proceedings that we have had here in the past. This is just another case of a legislative committee taking the position that the bill is sacred and there must not be any i's dotted or t's crossed.

This amendment is the same proposition that I argued here a moment ago but, as I pointed out in response to the Chair and in response to the objection of the learned gentleman from Pennsylvania, it only affects marine life, while my first amendment covered all resources. That is the point we are concerned about, that is the point that we wish to have restated if it must be restated so that we can stop so far as possible these interstate squabbles. We like to live in peace with our neighbors, we do not want to be squabbling with them and all we are asking here is, according to my ordinarily genial friend from Pennsylvania's contention, for a restatement that that be the law.

I hope that some of that milk of human kindness that pervades him ordinarily when he sits on the aisle will assert itself in his position of authority here and in his desire for protecting the sacredness of the committee bill as it is brought out. I hope the gentleman will accept the amendment; otherwise I realize fully that there is little hope of its adoption in view of what just happened on my first amendment.

But, Mr. Chairman, if this effort does prove to be futile as we have indicated we now suspect so far as the adoption of the amendment is concerned, it is nevertheless comforting to know that it has at least served the purpose of having made the record. And while the amendment may not prevail as part of the law, the debate will indicate conclusively that it is the opinion of the chairman of the Judiciary Committee of the House and the chairman of the subcommittee of the Judiciary Committee of the House as well as the opinion of the House that the substance of the amendment is presently the law of the land. And furthermore that the refusal of the amendment is based entirely and exclusively upon the opinion of the Judiciary Committee and of the House that the provisions of the amendment are now the law of the land and therefore that there is no necessity for a restatement of it in the bill.

MR. GRAHAM. Mr. Chairman, I rise in opposition to the pending amendment. I thank the gentleman from Mississippi for his fine compliment.

Mr. Chairman, it has always been my understanding that anything of a migratory nature, like migratory birds and such, must be settled by treaty or compact. This whole matter can be settled as between the States of Mississippi and Louisiana or between the States south thereof by a compact.

The argument we advanced in the other case applies here. This is limited to fish, but it is no different in our dealing with it than the other. We object to the amendment and we ask for its defeat.

MR. COLMER. Mr. Chairman, will the gentleman yield?

MR. GRAHAM. I yield to the gentleman from Mississippi.

MR. COLMER. The gentleman spoke of compacts. We entered into a compact down in these Southern States on the Gulf of Mexico here a couple of years ago and on the floor of this House I offered an amendment of similar import that would maintain the status quo, which was adopted and passed

unanimously by the House. That is what we are asking you to do here now — to have a restatement of that and a protection of our rights and to stop this squabbling.

THE CHAIRMAN. The question is on the amendment offered by the gentleman from Mississippi [MR. COLMER].

The question was taken; and the Chair being in doubt, the Committee divided and there were — ayes 25, noes 61.

So the amendment was rejected.

Supreme Court, U. S.
FILED
NOV 22 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1775

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JACK B. WESTCOTT,
RESPONDENT.

ON A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE PETITIONER

FRANCIS X. BELLOTTI
Attorney General
S. STEPHEN ROSENFELD
Assistant Attorney General
HOWARD WHITEHEAD
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1014
Attorneys for the Petitioner

Blanchard Press, Inc., Boston, Mass. — Law Printers

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In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1775

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JACK B. WESTCOTT,
RESPONDENT.

ON A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the majority of the Justices of the Supreme Judicial Court is reported at MASS. ADV. SH. (1976) 696-703 and 344 N.E. 2d 411-414. It is reproduced in the Appendix at pp. 11-16. The opinion of the dissenting justice of the Supreme Judicial Court is reported at MASS. ADV. SH. (1976) 704-716 and 344 N.E. 2d 414-419. It is reproduced in the Appendix at pp. 16-26.

Jurisdiction

On March 12, 1976, the Supreme Judicial Court entered a judgment declaring the Act of February 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended by* the Act of March 13, 1962, Ch. 219, [1962] Mass. Acts and Resolves 107, to be unconstitutional. Said judgment is reproduced in the Appendix at p. 26. A petition for a writ of certiorari was filed on June 7, 1976. Certiorari was granted on October 4, 1976.

Jurisdiction is conferred on this Court by the provisions of 28 U.S.C. §1257(3) (1976).

Statute Involved

The Act of February 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended by* the Act of March 13, 1962, Ch. 219, [1962] Mass. Acts and Resolves 107:

> It shall be unlawful during the months of July, August and September for any person who has not been a legal resident of this commonwealth during the preceding year to use beam or otter trawls to drag for fish in that part of the waters of Vineyard Sound lying in the towns of Chilmark, Gay Head and Gosnold, and included between an imaginary line running from the extreme western point of Gay Head to the extreme western point of Nashawena Island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light. Violation of this act shall be punished by a fine of not less than five hundred nor more than one thousand dollars.

Question Presented

Whether the Act of February 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended by* the Act of March 13, 1962, Ch. 219, [1962] Mass. Acts and Resolves 107, insofar as it differentiates between residents and non-residents of Massachusetts relative to the right to drag for fish in Massachusetts waters, violates the Privileges and Immunities Clause contained in Article IV, §2, of the United States Constitution.

Statement of the Case

The Act of February 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended by* the Act of March 13, 1962, Ch. 219, [1962] Mass. Acts and Resolves 107, makes it unlawful, during the months of July, August and September, for any person who has not been a legal resident of Massachusetts during the preceding year to use beam or otter trawls to drag for fish in certain of the state's waters. On September 5, 1973, Jack B. Westcott was arrested by an officer of the Massachusetts Department of Natural Resources and charged, in a criminal complaint, with violating the Act of 1923. (A. 2-3). On April 24, 1974, he was tried and found guilty of this violation by the District Court of Massachusetts. (A. 4).

Upon his conviction in the District Court, Westcott pursued his right to de novo review in the Superior Court, where he filed a motion to dismiss the action. (A. 7-8). The grounds of the motion were that the Act of 1923, insofar as it differentiates between residents and non-residents of Massachusetts, violates: (1) the Privileges and Immunities Clause contained in Article IV, §2, of the United States Constitution and (2) the Equal Protection Clause of the Fourteenth Amendment to United States Constitution. In

addition to Westcott's motion, the parties submitted to the court an agreed statement of facts. (A. 4-7). The statement indicated that, at the time of his arrest, Westcott was a resident of Rhode Island and had not been a resident of Massachusetts during the preceding year or during the year preceding July 1, 1973. (A. 5). It further indicated that he was arrested while dragging by means of otter trawl for scup and fluke, which are migratory fish, in the waters described by the Act of 1923. (A. 4-5).[1]

The Superior Court reserved decision on the case and, on May 23, 1974, reported to the Appeals Court the questions of law raised by Westcott's motion to dismiss. (A. 9-10). However, on May 15, 1975, before briefing and argument had taken place in the Appeals Court, the Supreme Judicial Court granted direct appellate review. (Docket entry, A. 2). Thereafter, on March 12, 1976, the Supreme Judicial Court, declaring that the Act of 1923 violates the Privileges and Immunities Clause, and without ruling on Westcott's equal protection claim, entered a judgment remanding the case to the Superior Court with the direction that the motion to dismiss be allowed.[2]

Summary of Argument

The Massachusetts statute does not violate the Privileges and Immunities Clause of Article IV because it represents an effort by Massachusetts to reserve a principal resource of the state, the Vineyard Sound fishery, for the use and enjoyment of its citizens. The use of fisheries and game by

[1] It is not disputed that the waters described by the Act lie within the territory of Massachusetts. These waters are shown in United States Coast and Geodetic Survey, Chart No. 1210 Tr published by the United States Department of Commerce and submitted under separate cover as an appendix to this brief.

[2] Mr. Justice Reardon, dissenting, expressed the view that the Act of 1923 is constitutional.

the state's citizens derives from their special ownership interest in these resources. Therefore, no fundamental right protected by the Privileges and Immunities Clause is affected by the statute, and it should be upheld.

In its first argument, Massachusetts demonstrates that this Court has for over one hundred and fifty years recognized that the citizens of a state possess a special ownership interest in fisheries and game located within the state. The principal case embodying that doctrine is *McCready* v. *Virginia*, 94 U.S. 391 (1876). In that case the Court upheld a Virginia statute restricting to its own citizens the use of one of the state's fisheries. In so doing, the Court held that the citizens of a state derive their right to the enjoyment of the state's fisheries from the special ownership interest which they possess in such fisheries. Accordingly, the right is a property right and not a privilege or immunity of citizenship guaranteed by the Constitution to the citizens of other states.

Although the doctrine embodied in *McCready* was repeatedly reaffirmed by this Court and followed by the state courts, a majority of the Supreme Court elected to depart from that doctrine in *Toomer* v. *Witsell*, 334 U.S. 385 (1948). Massachusetts addresses the *Toomer* case in its second argument. In limiting *McCready* for the first time to its precise facts, *Toomer* announced a new limitation on a state's ownership interests, holding that while, as in *McCready*, a state might own stationary fish located in its tidewaters, it possessed no ownership interests in free-swimming fish located in the marginal sea.

However valid when announced, the two distinctions drawn in *Toomer* between (a) the marginal sea and the tidewaters of a state, and (b) free-swimming and stationary fish, have subsequently been undermined. The distinction between tidewaters and the marginal sea was based upon a decision of the Court, *United States* v. *California*, 332

U.S. 19 (1947), announced the year before *Toomer*. The *California* case held that, as between the coastal states and the federal government, it was the federal government that exercised dominion over the marginal sea. This basis for denying a state the control of its seas was removed by passage of the Submerged Lands Act of 1953, 43 U.S.C. §1301 *et seq.* (1966), which conveyed to the states whatever elements of an ownership interest in the marginal sea they did not already possess. Therefore, the states now possess the same rights of ownership in the marginal sea which they possess in their tidewaters.

The remaining distinction drawn in *Toomer*, between free-swimming and stationary fish, cannot by itself justify invalidation of the Act of 1923. This distinction, when first articulated, contradicted over one hundred years of decisional law and was itself undermined by the passage of the Submerged Lands Act. Moreover, any distinction based upon the elusive factual question of relative mobility should be left for Congressional inquiry and line-drawing rather than judicial analysis.

Accordingly, *Toomer* has lost its force as useful precedent. *McCready* alone controls this case, and it compels the conclusion that the statute here in question is constitutional.

Argument

I. The Act of 1923 is Constitutional Because the Citizens of Massachusetts Possess a Special Ownership Interest in the State's Fisheries and Game.

The Act of 1923 reflects an effort by Massachusetts to reserve for the enjoyment of its own citizens certain of the state's fisheries. The state regards its fisheries as among its prime natural resources, worthy of protection and preservation for the benefit of its citizens. Massachusetts has

an interest in its fisheries as great as that which other states have in oil, vast forests or mineral deposits located within their territory. Such resources serve to make up the special qualities of a state, much like its climate and the collective character of its citizenry. The fisheries of Massachusetts are part of what attracts people to come to live within its borders or, if born there, to remain, preferring its natural gifts to those of other states. Unlike climate and human character, however, its fisheries are capable of depletion and, ultimately, exhaustion. By enacting a statute that limits the fishery of Vineyard Sound to its citizens, Massachusetts assures that this finite resource remains the benefit of those who have a special stake in its existence and a special claim to its use.

This Court has long maintained the doctrine that a state may, consistent with the requirements of the Constitution, restrict the use of its fisheries and game to its citizens. The doctrine was first articulated in 1825, in a case similar to this one. *Corfield* v. *Coryell*, 6 F.Cas. 546, 551-552 (C.C.E.D. Pa. 1825). It was reaffirmed throughout the 1800's and has been acknowledged by this Court as recently as the 1970's. *See, e.g., McCready* v. *Virginia*, 94 U.S. 391, 394-397 (1876); *Geer* v. *Connecticut*, 161 U.S. 519, 522-530 (1896); *Graham* v. *Richardson*, 403 U.S. 365, 372-374 (1971); *Sugarman* v. *Dougall*, 413 U.S. 635, 644, fn.11 (1973). The single case that casts a shadow on this doctrine is *Toomer* v. *Witsell*, 334 U.S. 385, 395-403 (1948). Massachusetts will show that *Toomer* falls outside of the mainstream of Supreme Court adjudication and stands alone, countered, in the words of Justice Frankfurter, by "the momentum of legal history." *Toomer* v. *Witsell, supra* at 408 (Frankfurter, J., dissenting). Ultimately, the prerogative of the state in this area must prevail.

In *Corfield* v. *Coryell, supra*, the Court was presented with a privilege and immunities challenge to a New Jersey

statute which prohibited the taking of oysters in state waters from a boat not wholly owned by a resident of the state. Mr. Justice Washington, sitting as a Circuit Justice, ruled that the statute was constitutional. Justice Washington began his opinion by expressing the view that the Privileges and Immunities Clause was intended to protect only those fundamental rights which belong to the citizens of all free governments. In that regard, he stated:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental;* which belong of right to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this union, from the time of their becoming free, independent and sovereign.
>
> 6 F. Cas. at 551 (emphasis in original).

He thereupon proceeded to denominate some of those fundamental rights:

> What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of any kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or reside in any other state, for purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise as regulated and established by the laws or constitution of the state in which it is to be exercised.
>
> 6 F. Cas. at 551-552.

Having outlined the protections accorded a state citizen by the Clause, Justice Washington proceeded to describe, as a wholly distinct interest, the special ownership interest which the citizens of a state possess in the enjoyment of the state's fisheries:

> A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water . . . Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without

> the tacit consent, or the express permission of the sovereign who has the power to regulate its use.[3]
>
> 6 F. Cas. at 552.

Justice Washington thus concluded that a state's citizens possess a proprietary right in the state's fisheries. While his description of the right suggested many incidents of a fee simple, he did not label the right as such. Rather, he invoked, by analogy, the interest which a private landowner possesses in the fisheries and game found upon his domain. 6 F. Cas. at 552. The landowner may exclude all others from entering upon that domain and thereby reserve to himself the exclusive use of such fisheries and game. He does not possess a fee simple, but a qualified interest based upon his ownership of the domain. *See generally* W. Blackstone, The Laws of England, vol.2, at 394 (21st ed. 1844).

Having outlined the nature of the guarantees provided by the Privileges and Immunities Clause, and having described the nature of the interest which the citizens of a state possess in the state's fisheries, the Court met the privileges and immunities claim frontally, setting forth the equities which supported giving the state's citizens a special claim to its fisheries:

> . . . [I]t would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a co-tenancy in the common property of the state to the citizens of all the other states.
>
> * * *

[3] It should be noted that Justice Washington made no distinction between stationary and free-swimming fish. See the discussion of *Toomer* v. *Witsell*, *post* at pp. 23-26.

> Such a construction would, in many instances, be productive of the most serious public inconvenience and injury, particularly in regard to those kinds of fish, which, by being exposed to too general use, may be exhausted. The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe.
>
> 6 F. Cas. at 552.

Thus, the right of a state's citizens to take fish from its waters was a right derived not from their citizenship per se, but rather a right derived from their special collective ownership interest in the state's fisheries. This being the case, the right of the state's citizens to take fish from its waters was not a privilege or immunity of citizenship guaranteed by the Constitution to the citizens of other states.

The views expressed by Mr. Justice Washington in *Corfield*, *supra*, were soon confirmed by the Full Court in *McCready* v. *Virginia*, 94 U.S. 391 (1876). There, the Court was presented with a privileges and immunities challenge to a Virginia statute which prohibited non-citizens of the state from planting oysters in certain of the state's tidewaters. As was the case in *Corfield*, the Court reiterated that the citizens of a state possess a special ownership interest in the state's fisheries, and that their right to the enjoyment of such fisheries is a property right rather than a privilege or immunity of citizenship. Specifically, the Court declared:

> The principle has long been settled in this court, that each State owns the beds of all tide-waters within its

jurisdiction, unless they have been granted away. *Pollard's Lessee* v. *Hagan,* 3 How. 212; *Smith* v. *Maryland,* 18 How. 74; *Mumford* v. *Wardwell,* 6 Wall. 436; *Weber* v. *Harbor Commissioners,* 18 *id.* 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin* v. *Waddel,* 16 Pet. 410. The title thus held is subject to the paramount right of navigation, the regulation of which in respect to foreign and inter-state commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.

94 U.S. at 394-395.

Accordingly, the Court concluded as follows:

> [W]e think we may safely hold that the citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State. If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds amongst its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious; the right thus granted is not a privilege or immunity of general but of special citizenship. It does not "belong of right to the citizens of all free governments," but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone, had the power to dispose of it as they saw fit. They owned it not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality.
>
> The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow that it might by appropriate legislation confine the use of the whole to its own people alone.
>
> 94 U.S. 395-396.

Thus, relying on the ownership principle, the Court upheld the statute.[4]

Corfield and *McCready* were the first cases to articulate the principle that the citizens of a state possess a special ownership interest in the state's wildlife resources, and to apply that principle to the mandate of the Privileges and Immunities Clause. Therefore, among the early decisions, they are the two that most directly support the position advanced by Massachusetts. However, the Court's decision in *Geer* v. *Connecticut,* 161 U.S. 519 (1896), also provides substantial support for that position. *Geer* involved a commerce clause challenge to a Connecticut statute which required that certain game birds killed in Connecticut remain for use within the state's boundaries. In upholding the statute the Court undertook an extensive review of the history of ownership in wild animals from the days of Roman law to the present. The relevant portions of that review are as follows:

> From the earliest traditions the right to reduce animals *ferae naturae* to possession has been subject to the control of the law-giving power.
>
> 161 U.S. at 522.
>
> * * *
>
> In the feudal as well as the ancient law of the continent of Europe, in all countries, the right to acquire animals *ferae naturae* by possession was recognized

[4] Unlike Mr. Justice Washington, the Court did not attempt to establish a general definition of what are and what are not privileges and immunities of citizenship. Rather, it suggested that a more proper approach is to consider each case on its own facts. 94 U.S. at 395. Both approaches have found varying favor with the Court over the years. *Compare, e.g., The Slaughter House Cases,* 16 Wall. 36, 75-77 (1873) *with Conner* v. *Elliot,* 18 How. 591, 593 (1856). *See also Austin* v. *New Hampshire,* 420 U.S. 656 660 (1975); *Paul* v. *Virginia,* 8 Wall. 168, 180-181 (1868).

> as being subject to the governmental authority and under its power, not only as a matter of regulation, but also of absolute control.
>
> 161 U.S. at 523.
>
> * * *
>
> The practice of the government of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game.
>
> Undoubtedly this attribute of government to control the taking of animals *ferae naturae*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the States with the separation from the mother country, and remains in them at the present day, insofar as its exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution.
>
> 161 U.S. at 527-528.
>
> * * *
>
> Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power of control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State, as held by this Court in *Martin* v. *Waddell*,

16 Pet. 410, represents its people, and the ownership is that of the people in their united sovereignty.

161 U.S. at 529.

Thus, the Court once again made plain that the citizens of a state possess, in common, a special ownership interest in the wild animals found within the state. Moreover, it gave direct support to *Corfield* and *McCready* by criticizing "the contention that a State cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own." 161 U.S. at 530.

The doctrine established by *Corfield*, *McCready*, and *Geer*, has been recognized in subsequent decisions of this Court. For example, in *Patsone* v. *Pennsylvania*, 232 U.S. 138 (1914), the Court upheld the constitutionality of a Pennsylvania statute which prohibited the ownership of guns by aliens for the purpose of killing game within the state. Citing *Geer*, the Court declared, "It is to be remembered that the subject of this whole discussion is wild game, which the State may preserve for its own citizens if it pleases." 232 U.S. at 145-146. Moreover, in *Truax* v. *Raich*, 239 U.S. 33 (1915), the Court struck down an Arizona statute which restricted the employment of aliens. In doing so, it noted, "The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States." 239 U.S. 33, 39-40. Finally, in *LaCoste* v. *Department of Conservation of Louisiana*, 263 U.S. 545 (1924), the Court held constitutional a Louisiana statute imposing a tax on animal hides taken within the state. In its decision, it observed, "The wild animals within its

borders are, so far as capable of ownership, owned by the State in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the State may regulate and control the taking, subsequent use and property rights that may be acquired therein." 263 U.S. at 549 (*citing, inter alia, Geer, supra* at 528). *Cf. Sugarman* v. *Dougall*, 413 U.S. 634, 644, fn. 11 (1973) (recognizing a "special-public-interest doctrine" under which the Court has upheld "statutes that, in the absence of overriding treaties,[5] limit the right of noncitizens to exploit a State's natural resources"); *Graham* v. *Richardson*, 403 U.S. 365, 372-374 (1971) (also recognizing a "special-public-interest doctrine").[6]

All of these cases reflect a recognition that the right of a state's citizens to the enjoyment of its wildlife resources is something unique and separate from other rights which citizens possess. That unique interest of citizens should be reaffirmed in this case as the basis for permitting Massachusetts to preserve its fisheries for the use and benefit of Massachusetts citizens.

---

[5] Regarding the reference to overriding treaties, see the discussion of *Missouri* v. *Holland*, 252 U.S. 416 (1920), *post* at pp. 23-25.

[6] The doctrine of *Corfield*, *McCready* and *Geer*, *supra*, was widely accepted by the state courts as well. *See, e.g., Organ* v. *State*, 56 Ark. 267, 270, 19 S.W. 840, 840-841 (1892); *State* v. *Farroba*, 201 La. 259, 266, 9 So. 2d 539, 542 (1942); *State* v. *Ruvido*, 137 Me. 102, 105, 15 A.2d 293, 295 (1940); *Bruce* v. *Director, Department of Chesapeake Bay Affairs*, 261 Md. 585, 607-611, 276 A.2d 200, 212-213 (1971); *State* v. *Corson*, 67 N.J.L. 178, 183, 50 A. 780, 783 (1901); *State* v. *Kofines*, 33 R.I. 211, 231, 80 A. 432, 440 (1911); *Haughton* v. *Lankford*, 189 Va. 183, 194-195, 52 S.E. 2d 111, 116 (1949).

With regard to the lower federal courts, a recent application of the doctrine may be found in *Maine* v. *M/V Tamano*, 357 F. Supp. 1097, 1100 (D. Maine 1973). There, the court, citing *McCready*, ruled that the interest which the citizens of a state possess in its marine resources empowers the state to bring a *parens patriae* action against entities responsible for damaging those resources by an oil spill.

II. *Toomer* v. *Witsell* Does Not Support an Attack on the Constitutionality of the Act of 1923, Because Other Decisions of This Court and Subsequent Congressional Action Undermine Its Authority.

In *Toomer* v. *Witsell*, 334 U.S. 385, 395-403 (1948), the Court, for the first time, departed from the doctrine of *Corfield*, *McCready* and *Geer*. The facts of *Toomer* may be stated briefly. A statute of South Carolina imposed a prohibitory license fee of $2500 on certain non-resident boats taking migratory shrimp within three miles of the state's coastline, but charged similar boats owned by residents a license fee of only $25. The plaintiff, a non-resident of South Carolina, brought an action to enjoin the imposition of the higher fee, claiming that the statute violated the Privileges and Immunities Clause. The Court struck down the statute.

Recognizing that its decision directly contradicted what had been said in the earlier cases, the Court attempted to de-emphasize the significance of those cases. 334 U.S. at 400. It began by indicating that *McCready* was the only case relevant to the question before it, thus avoiding any discussion of *Corfield* or *Geer*. The Court then attempted to narrow the principle upon which the *McCready* decision was based. It did so by noting two factual distinctions between *McCready* and *Toomer*. 334 U.S. at 401. First, the fish involved in *McCready* were stationary, while those involved in *Toomer* were free-swimming. Second, the *McCready* fishery was located in the state's tidewaters, while the fishery involved in *Toomer* was located in the marginal sea. The Court next asserted that, given these two distinctions, the citizens of South Carolina could not be said to own the fisheries involved in *Toomer* in the same manner that the citizens of Virginia owned the fisheries in *McCready*. 334 U.S. at 401-402. Finally, the Court proceeded to criticize, in dictum, the ownership doctrine in its entirety, stating:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against the citizens of other States.
>
> 334 U.S. at 402.

Thus, in the view of the Court, the right of the citizens of South Carolina to take free-swimming fish from the marginal sea was not a property right, but rather a privilege or immunity of citizenship, which could not constitutionally be denied to citizens of the other states. *Id.*[7]

The two distinctions drawn by the Court between the facts of *Toomer* and those of *McCready* should not be permitted to control here. With regard to the distinction between ownership in the tidewaters and ownership in the marginal sea, the *Toomer* Court stated:

> The fact that it is activity in the three-mile belt which the South Carolina statute regulates is of equal relevance in considering the applicability of the ownership doctrine. While *United States* v. *California*, 332 U.S. 19 (1947), . . . does not preclude all State regulation of activity in the marginal sea, the case does hold that neither the thirteen original colonies nor their succes-

[7] *See also Mullaney* v. *Anderson*, 342 U.S. 415 (1952) (on authority of *Toomer*, statute of Alaska Territory imposing license fee on non-residents higher than that imposed on residents, relative to fishing in marginal sea, held violative of Privileges and Immunities Clause); *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948) (state statute restricting rights of aliens to fish in marginal sea held violative of Equal Protection Clause).

> sor States separately acquired "ownership" of the three-mile belt.
>
> 334 U.S. at 402.

As the quoted language suggests, the Court was heavily influenced by its decision, a year earlier, in *United States* v. *California* 332 U.S. 19 (1947). This case involved an action brought by the United States for a determination of the respective rights of the United States and California to the land and natural resources located in the marginal sea within three miles of the state's coastline. Declaring that the United States had, since the War of Independence, acquired "broad dominion and control" over the three-mile belt, the Court ruled that the rights of the Federal Government in the belt were "paramount" to those of the state. 332 U.S. at 33-34, 39. It expressly stated that California did not have ownership rights in the belt. 332 U.S. at 38.

The conclusions set forth in *United States* v. *California* were subsequently reaffirmed in *United States* v. *Louisiana*, 339 U.S. 699, 704-706 (1950), and *United States* v. *Texas*, 339 U.S. 707, 715-720 (1950). Given the *California, Louisiana* and *Texas* decisions, the *Toomer* Court's distinction between a state's ownership rights in its tidewaters and its rights in the marginal sea might have been sound at the time. However, the basis for that distinction has since been eliminated.

Public reaction to the principles set forth in the *California, Louisiana* and *Texas* decisions was immediately and overwhelmingly unfavorable. In particular, Congress considered the cases as a usurpation by the Federal Government of rights which had historically belonged to the states. *See* H.R. Rep. No. 215, 83d Cong., 1st Sess. 15, 34-53 (1953); S. Rep. No. 133, 83d Cong., 1st Sess. 6-8, 54-74 (1953).[8] The

[8] The Senate Committee on Interior and Insular Affairs stated:

result was the passage of the Submerged Land Act of 1953. *See* H.R. Rep. No. 215, *supra* at 5; S. Rep. No. 133, *supra* at 5.

The Act is now codified in 43 U.S.C. §1301 *et seq.* (1966). Section 1311(a) conveys to the respective coastal states the "rights of dominion" which the United States had been deemed to possess as a result of the *California, Louisiana* and *Texas* decisions. Section 1311(a) provides as follows:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States . . .

Section 1301, the definitions section, leaves no doubt that Congress conveyed not only the lands under the marginal sea but all of the natural resources, including fish, found within the three-mile belt:

> . . . [T]he Court . . . not only established the law differently from what eminent jurists, lawyers, and public officials for more than a century believed it to be, but also differently from what the Supreme Court had believed it to be.
>
> S. Rep. No. 133, *supra* at 56.

In the latter regard, the Court itself declared, in *United States* v. *California*:

> . . . [T]his Court has followed and reasserted the basic doctrine of [*Pollard's Lessee* v. *Hagan*, 3 How. 212 (1844)] many times. And in so doing it has used language strong enough to indicate that the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not.
>
> 332 U.S. at 36.

When used in this chapter —

(a) The terms "land beneath navigable waters" means —

* * *

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress extends seaward (or into the Gulf of Mexico) beyond three geographical miles,

* * *

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and *fish,* shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power. (emphasis supplied.)

By its terms, the Act conveys to the respective coastal states an *ownership* interest in such lands and resources. That such was the intent of Congress is clear from a review of the legislative history of the Act. *See, e.g.,* H.R. REP. No. 215, *supra* at 15; S. REP. No.133, *supra* at 64, 72-73.[9] Moreover, that the section did, in fact, convey such an interest was confirmed by this Court's decision in *Alabama* v. *Texas,* 347 U.S. 272 (1954). There the Court upheld the constitutionality of the Act as a valid exercise of the power

[9] The House Committee on the Judiciary and the Senate Committee on Interior and Insular Affairs both stated:

> The offshore rights which are confirmed to the States and their grantees are rights growing out of the concept of ownership and proprietary use and development . . .
>
> H.REP. No. 215 at 15, S. REP. No. 133 at 72-73.

vested in Congress by Article IV, §3, cl. 2, of the Constitution to "dispose of . . . Property belonging to the United States." 272 U.S. at 273. Mr. Justice Reed, concurring, stated:

> The use or control of the undersea area and its resources by the respective states cannot . . . now be challenged by any other state on the ground of lack of sovereignty in the challenged state.
>
> 347 U.S. at 276.

See also United States v. *Louisiana,* 363 U.S. 1, 16-20 (1959).

Thus, there can be no doubt that the states now possess the same rights of ownership over fisheries located in the marginal sea as they have always possessed over fisheries located in their tidewaters. That being the case, the distinction drawn in *Toomer* between state ownership in the tidewaters and ownership in the marginal sea can no longer, in and of itself, preclude a state from preserving its fisheries for the benefit of its citizens.

Accordingly, the only remaining basis for questioning the applicability of the *McCready* doctrine to the Massachusetts statute is the other distinction set forth in *Toomer,* namely, that the fish involved in *McCready* were stationary while those involved in *Toomer* were migratory. That distinction lacks merit for two reasons. First, it finds no support in prior Supreme Court adjudication. Second, it is a deceptive factual distinction with problematic implications best left to legislative inquiry and line-drawing; to the degree that Congress has addressed the question of state ownership of marine resources, it has not adopted the *Toomer* distinction.

In support of the stationary-migratory distinction, the *Toomer* Court offered only two authorities. The first was *Missouri* v. *Holland,* 252 U.S. 416 (1920). That case involved

an action by Missouri to enjoin a federal game warden from enforcing within the state the provisions of a federal treaty which regulated the taking of migratory birds. The state claimed that it possessed an ownership interest in such birds which rendered them immune from the operation of the treaty. Mr. Justice Holmes, writing for the Court, disagreed. The language quoted in the *Toomer* opinion is as follows:

> To put the claim of the State upon title is to lean upon a slended reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.
>
> 252 U.S. at 434.

When this language is read in its proper context, it becomes plain that Justice Holmes was not criticizing the ownership doctrine as such, but rather the state's attempt to assert that doctrine in derogation of the federal treaty power. Thus, as Justice Holmes went on to state:

> If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state border, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.
>
> As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the reliance of such laws the state might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." *Baldwin* v. *Franks*, 120 U.S. 678, 683. No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.
>
> 252 U.S. at 434.

Thus, while the Court ruled that the state's ownership of the birds was not sufficient to suspend the operation of the treaty, the fundamental principle underlying its ruling was that the federal treaty power is paramount to *all* state authority. There is no inconsistency between that ruling and the contentions advanced by Massachusetts in this case. Certainly Mr. Justice Holmes saw no such inconsistency, for in *Patsone* v. *Pennsylvania, supra,* decided six years prior to *Missouri* v. *Holland,* he stated, "It is to be remembered that the subject of this whole discussion is wild game, which the State may preserve for its own citizens if it pleases." 232 U.S. at 145-146.

The only other case cited by the *Toomer* Court in support of the stationary-migratory distinction was *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). In that case, the Court upheld the power of Massachusetts to regulate fishing in Buzzard's Bay. However, the Court expressed no opinion whatsoever as to whether or not a state might prohibit non-residents from taking free-swimming fish. 139 U.S. at 265.

Against the meager authority offered by the *Toomer* Court, there stands one hundred and twenty-five years of prior decisional law treating a state's ownership interest in mobile or migratory animals precisely the same as its interest in stationary animals. *See, e.g., Corfield, supra* at 552; *McCready, supra* at 394; *Geer, supra* at 522-530.

Equally important is the fact that Congress, in conveying to the States the resources within the marginal belt, made no distinction between stationary fish and free-swimming fish. As noted above, the resources conveyed by 43 U.S.C. §1311(a) include *all* fish within the three-mile belt. The failure of Congress to draw a distinction between stationary and migratory fish was not the result of oversight. Rather, it reflected the view of Congress, based upon an exhaustive review of the law of coastal resource management, that ownership of the lands and waters of the

marginal sea necessarily entailed ownership of all the resources found within those lands and waters. As the Senate Committee on Interior and Insular Affairs observed:

> Except in a few instances, where international treaties were involved, State control of fishing in navigable waters, within the State's boundaries, has been exclusive. The principal basis for this right to control fishing rests upon the proprietary rights of the State to the waters and the soil thereunder.
>
> S. REP. No. 133, *supra* at 64 (*citing, e.g., McCready, supra*).

See also H.R. REP. No. 215, *supra* at 43 (using identical language).

Ultimately, the appropriateness of a distinction between migratory and stationary wildlife is best left for Congressional analysis. The relative mobility of a given species of fish is an elusive concept at best. Where Congress has indicated that such a concept is not the criterion upon which important rights should turn, this Court should respect its judgment. *Cf. Katzenbach* v. *Morgan*, 384 U.S. 641, 648-658 (1966); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring); *Welsh* v. *United States*, 398 U.S. 333, 367 (1970) (White, J., dissenting). *See also* Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CINN. L. REV. 199 (1971). The application of the Privileges and Immunities Clause ought not depend on the unique biological characteristics of a fish.[10]

[10] Moreover, the apparent simplicity of the migratory-stationary distinction is deceptive. It introduces problems of ownership into the area of mineral resources, which Congress clearly intended to vest in the states. Gas and oil, like animals, are capable of natural movement across state lines. If migratory fish are to be deemed incapable of ownership, there would be no principled basis for concluding that gas and oil are capable of ownership. From the earliest times, courts have compared ownership of natural gas and oil to that of wild animals. *See Hammonds* v. *Central Kentucky Natural Gas Co.*, 255 Ky. 685, 689, 75 S.W. 2d 204, 206 (1934). In *Westmoreland & Cambria Natural Gas Co.* v. *DeWitt*, 130 Pa. 235, 18 A. 724 (1899), the court said:

> Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals ferae naturae. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owners. Their "fugitive and wandering existence within the limits of a particular tract was uncertain." . . . They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas.
>
> 130 Pa. at 249, 18 A. at 725 (citations omitted).

In *Brown* v. *Spilman*, 155 U.S. 665 (1894), this Court itself recognized the migratory nature of oil and gas:

> Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed *situs*, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone.
>
> 155 U.S. at 669-670.

[11] The sole authority cited by the *Toomer* Court in support of its critique was R. POUND, AN INTRODUCTION TO THE PHILOSOPHY

The above discussion establishes that, however valid in 1948, the arguments which the *Toomer* Court used to distinguish *McCready* have lost their vitality. Thus, in his attack on the Act here involved, Westcott is left solely with the Toomer Court's general critique of the ownership doctrine. The statements contained in that critique are a wholly inadequate basis for striking down a state statute. Having declined to overrule *McCready*, the *Toomer* Court's critique of the ownership doctrine cannot be read as anything more than dictum.[11] It was advanced during a time when the Court believed that the states should not be permitted to assume absolute control of coastal resources. *See United*

States v. *California, United States* v. *Louisiana,* and *United States* v. *Texas, supra.* Congress, however, made a different determination in the Submerged Lands Act. The *Toomer* Court's ownership critique has therefore lost whatever significance it may once have possessed.

Thus, in determining whether the Act of 1923 comports with the requirements of the Privileges and Immunities Clause, this Court should reject *Toomer* and follow *McCready,* which Justice Frankfurter characterized as "the symbol of one of the weightiest doctrines in our law." *Toomer, supra,* at 408 (Frankfurter, J., concurring). On the basis of this doctrine, the Court should hold that the Act of 1923 is constitutional, thereby permitting Massachusetts to preserve for the use of its citizens the fishery of Vineyard Sound.

Conclusion

For the reasons stated above, Massachusetts urges that the decision of the Supreme Judicial Court be vacated and that the case be remanded for a consideration of the respondent's equal protection claim.*

FRANCIS X. BELLOTTI
Attorney General
S. STEPHEN ROSENFELD
Assistant Attorney General
HOWARD WHITEHEAD
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1014

November 22, 1976 *Attorneys for the Petitioner*

* The substantial assistance of Carl Valvo, Class of 1977, Boston College Law School, is hereby gratefully acknowledged.

OF LAW, 197-202 (1922). While Dean Pound was generally critical of the ownership doctrine he did recognize that a state must have the power to determine "the persons by whom [wild animals] may be acquired in order to prevent their extermination." Pound, *supra* at 199.

1

FOR INSTRUCTIONAL PURPOSES ONLY. NOT TO BE USED FOR NAVIGATION

1210 1210 Tr

UNITED STATES – EAST COAST
MASSACHUSETTS – RHODE ISLAND

MARTHA'S VINEYARD TO BLOCK ISLAND

INCLUDING WESTERN APPROACH TO CAPE COD CANAL

Mercator Projection
Scale 1:80,000 at Lat. 41°27'

SOUNDINGS IN FEET
AT MEAN LOW WATER

ANCHORAGE AREAS

LOGARITHMIC SPEED SCALE

To find SPEED, place one point of dividers on nautical miles run and the other on minutes run. Without changing divider spread, place right point on 60 and left point will then indicate speed in knots. Example: with 4.0 miles run in 15 minutes, the speed is 16.0 knots.

NOTE

Navigation regulations are published in Chapter 2, Coast Pilot 1, and subsequent changes and weekly Notices to Mariners. Copies of corrections may be obtained at the office of the District Engineer, Corps of Engineers in Waltham, Mass.
Refer to section number in text with area designation

ABBREVIATIONS (For complete list of Symbols and Abbreviations, see C & G.S. Chart No. 1)

Lights, Lights are white unless otherwise indicated.)

F. fixed	Sl. short long	OBSC. obscured	Occ. occulting
Fl. flashing	Occ. occulting	alt(n). alternate	SEC. sector
Qk. quick	Alt. alternating	Dia. diaphone	m. minutes
Int. interrupted	Qk. interrupted quick	M. nautical miles	sec. seconds

Buoys T.S. temporary buoy N. nun B. black Or. orange W. white
C. can S. spar R. red G. green Y. yellow

Bottom characteristics

M. mud	hrd. hard	bk. black	gr. grey
Co. coral	Rk. rock	sy. rocky	br. brown	rd. red	wh. white
G. gravel	S. sand	sft. soft	bu. blue	wh. white	yl. yellow
Gvl. gravel	Sh. shells	stk. sticky	gn. green	yl. yellow	

Wreck, rock, obstruction, or shoal swept clear to the depth indicated
Rocks that cover and uncover, with heights in feet above datum of soundings

AERO aeronautical R. Bn. radiobeacon C. G. Coast Guard station
Bn. radiobeacon R. TR. radio tower D.F.S. distance finding station
AUTH. authorized Obstr. obstruction P.A. position approximate E.D. existence doubtful

TIDAL INFORMATION

Place	Mean High Water	Mean Low Water	Mean Low Water	Extreme Low Water
	feet	feet	feet	feet
Gay Head	3.0	1.5	0.0	−2.5
Woods Hole	1.8	0.6	0.0	−2.5
Vineyard Haven	3.3	1.8	0.0	−2.5
Menemsha	3.5	1.8	0.0	−2.5
Point Judith	3.1	1.5	0.0	−2.5

(Plan)

HEIGHTS

Heights in feet above Mean High Water

AUTHORITIES

Hydrographic and topographic by the Coast and Geodetic Survey with additions and revisions from the Corps of Engineers and Geological Survey

CAUTION

Improved channels shown by broken lines are subject to shoaling, particularly at the edges

CAUTION

Temporary obstructions in operation are not indicated on this chart except where a light indicates a fixed aid. See Notice to Mariners

CAUTION

Mariners are warned to stay clear of the protective breakwaters surrounding large light structures

NOTE C

NEW BEDFORD AND FAIRHAVEN HARBOR

The present depth in the river between Rodman Pier and above the New Bedford and Fairhaven Bridge for controlling depth see Chart 247 and 248

CAPE COD CANAL CHANNEL DEPTHS

Tabulated from current by the Corps of Engineers - report of Mar. 1962

Controlling depths in channels entering from Cape Cod Bay in feet at Mean Low Water

Name of Channel	Left outside quarter	Middle half of channel	Right outside quarter	Date of Survey	Existing dredged width (feet)	Project Dimensions: Length (nautical miles)	Project Dimensions: Depth M.L.W. (feet)
Canal Land Cut	32.0	31.0	32.0	7-62	480	7.6	32
Hog Island Channel	32.0	31.0	32.0	7-62	500	3.8	32
Cleveland Ledge Channel	±30.0	±32.0	±30.0	7-62	700	3.4	32

a. A controlling depth of 25 feet exists at the southwesterly approach to Cleveland Ledge Channel between lines bearing 232° from the charted positions of Cleveland Ledge Channel Lighted Buoy 1 (41°33'.6 N, 70°45'.9 W.) and Buzzards Bay Lighted Buoy 2A (41°32'.6 N., 70°42'.9 W.).
Note: The Corps of Engineers should be consulted for changing conditions with respect to the above

CAPE COD CANAL

Traffic signals are maintained at Wing Neck Bridge, Buzzards Bay and at the Canal Bus Ex-Railroad Bridge. For information on operating conditions, see aids to navigation, telegraph or radio at the Canal Office, Buzzards Bay, also chart 251

LOCAL MAGNETIC DISTURBANCE

Differences of as much as 5° from the normal variation may be expected in the vicinity of the Cape Cod Canal, Buzzards Bay and Vineyard Sound

NEW BEDFORD

Fairhaven

Mattapoisett

Marion

Wareham

Onset

Stanford

Woods Hole

Falmouth

Vineyard Haven

Edgartown

Menemsha

Gay Head

Cuttyhunk

Nashawena I.

Pasque I.

Penikese I.

Naushon I.

Elizabeth Islands

MARTHA'S VINEYARD

NARRAGANSETT BAY

WEST PASSAGE

EAST PASSAGE

SAKONNET RIVER

MOUNT HOPE BAY

BUZZARDS BAY

RHODE ISLAND SOUND

POINT JUDITH POND

GOVERNMENT CHANNEL

BLOCK ISLAND

AREA ENCLOSED BY ACT OF FEB. 20, 1923

Southwest Shoal

East Ground

Compiled and printed at Washington, D.C. by U.S. DEPARTMENT OF COMMERCE
Luther H. Hodges, Secretary
COAST AND GEODETIC SURVEY

FOR INSTRUCTIONAL PURPOSES ONLY. NOT TO BE USED FOR NAVIGATION

(Martha's Vineyard to Block Island)
SOUNDINGS IN FEET - SCALE 1:80,000

C.&G.S. ~~1210~~
1210 Tr

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 75-1775

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
JACK B. WERTOTT,
Respondent.

ON A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

APPENDIX TO THE
BRIEF FOR THE PETITIONER

APPENDIX

2/1

GENERAL REMARKS

Chart No. 1 contains symbols and abbreviations which have been approved for use on nautical charts published by the United States of America, 1948. Some symbols and abbreviations are numbered in accordance with a standard form approved by a 1962 resolution of the International Hydrographic Organization (IHO). Although the use of IHO approved symbols and abbreviations is not mandatory, the USA has cooperated to adopt many IHO approved symbols for standard use on U.S. nautical charts. A few features differ. Differences in the first column of the following pages indicate symbols and abbreviations that are as follows:

SLANTING FIGURES indicate those items for which the symbol and abbreviation are in accordance with resolutions of the IHO.

SLANTING FIGURES indicate those symbols for which IHO resolution has been adopted.

SLANTING FIGURES UNDERLINED indicate that the symbol has been adopted by the USA.

SLANTING FIGURES PARENTHESIZED indicate that the items are in addition to those appearing in the 1962 IHO report of standard form.

All changes since the June 1965 edition of this publication are indicated by the dagger symbol in the margin immediately adjacent to the item identification of the symbol or abbreviation affected.

BEARINGS: A conspicuous feature on a bearing may be shown by a landmark symbol with a descriptive label (See I-6a, 16, 18, 22). Prominent buildings that are of assistance to the mariner may be shown in actual shape as viewed from above (See I-1a, 1, 47, 48).

BUOYS and BEACONS: On entering a channel from seaward, buoys on starboard side are red with even numbers, on port side black with odd numbers. Light on buoy on starboard side of channel are red or white, on port side white or green. Well-channel buoys have black and white vertical stripes. Junction or obstruction buoys, which may be passed on either side, have red and black horizontal bands. This system does not always apply to foreign waters. The dot of the buoy symbol, the small circle of the light vessel and mooring buoy symbols, and the center of the beacon symbol indicate their positions.

COLORS are optional for characterizing various features and areas in the charts.

DEPTH contours and soundings are shown in meters on an increasing number of new charts and new editions.

HEIGHTS of land and conspicuous objects are given in feet above Mean High Water, unless otherwise stated in the title of the chart.

IMPROVED CHANNELS are shown by limiting dashed lines with the depth and date of the latest examination plotted adjacent to the channel center when the channel data is tabulated.

LETTERING styles and capitalization as indicated in Chart No. 1 are not always rigidly adhered to on the charts.

LONGITUDES are referred to the Meridian of Greenwich.

OBSOLESCENT SYMBOLIZATION on charts will be revised to agree with the current preferred usage as soon as opportunity affords.

SCALES are computed on the middle latitude of each chart, or on the middle latitude of a series of charts.

SHORELINE is the line of Mean High Water, except in marsh and mangrove areas, where the apparent shoreline (outer edge of vegetation) is used. A heavy line (A.9) is used to represent a firm shoreline. A light line (A.5) represents an apparent shoreline.

U. S. COAST PILOTS, SAILING DIRECTIONS, LIGHT LISTS, RADIO AIDS, and related publications furnish information required by the navigator that cannot be shown conveniently on the nautical chart.

U. S. NAUTICAL CHART CATALOGS and INDEXES list nautical charts, auxiliary maps, and related publications, and include general information relative to the charts.

Some differences may be observed between Chart No. 1 and symbols shown on certain reproductions of foreign charts and special charts. Foreign symbols may be interpreted by reference to the Symbol Sheet or Chart No. 1 of the originating country. A glossary of foreign terms and abbreviations is generally given on charts on which they are used, as well as in the Sailing Directions.

A. The Coastline (Nature of the Coast) (see General Remarks)

1. Shoreline surveyed
2. Piers (Coast (Built))
3a. Flat coast
3b. Cliffy coast
3c. Rocky coast
4. Sandhills, Dunes
5. Stony or Shingly shore
6. Sandy shore
7. Mangrove
8. Surveyed coastline
9. High water line
10. Low water (sounding datum) line
11. Foreshores
12. Approximate water line, water line
13. Mud
14a. Mud
14b. Sand
15. Stones, Shingle, or Gravel
16. Limit of unsurveyed areas
17. Pitted rock
18. Rock, uncovers at sounding datum (See A-9g)
19. Sand and mud
20. Sand and gravel
21. Coral
22. Coral reef, drying
23. Rubble

B. Coast Features

*1	G	Gulf
2	B	Bay
(Bn)	B	Bayou
3	Fd	Fjord
4	L	Loch, Lough, Lake
5	Cr	Creek
5a	C	Cove
6	In	Inlet
7	Str	Strait
8	Sd	Sound
9	Pass	Passage, Pass
	Thoro	Thorofare
10	Chan	Channel
10a		Narrows
11	Entr	Entrance
12	Est	Estuary
12a		Delta
13	Mth	Mouth
14	Rd	Road, Roadstead
15	Anch	Anchorage
16	Hbr	Harbor
16a	Hn	Haven
17	P	Port
(Bn)	P	Pond
18	I	Island
19	It	Islet
20	Arch	Archipelago
21	Pen	Peninsula
22	C	Cape
23	Prom	Promontory
24	Hd	Head, Headland
25	Pt	Point
26	Mt	Mountain, Mount
27	Rge	Range
27a		Valley
28		Summit
29	Pk	Peak
30	Vol	Volcano
31		Hill
32	Bld	Boulder
33	Ldg	Landing
34		Table-land (Plateau)
35	Rk	Rock
36		Isolated rock
(Br)	Str	Stream
(Bd)	R	River
(Bn)	Slu	Slough
(Bl)	Lag	Lagoon
(Ba)	Appro	Approaches
(Bh)	Rky	Rocky

C. The Land (Natural Features)

1. Contour lines (Contours)
1a. Contour lines, approximate (Contours)
2. Hachures
2a. Form lines, no definite crests
2b. Shading
3. Cliffs
4. Scarps
5. Isolated trees
5a. Deciduous tree (Conifer)
5b. Conifer
5c. Palm tree
5d. Nipa palm
5e. Filao
5f. Casuarina
5g. Evergreen tree (other than coniferous)
6. Cultivated
6. Cultivated fields
6a. Grass fields
7. Paddy (rice) fields
7a. Park, Garden
8. Bushes
8. Bushes
8a. Tree plantation (in general)
9. Wooded
9. Deciduous woodland
10. Coniferous woodland
10a. Woods (in general)
11. Tree top height (above shoreline datum)
12. Lava flow
13. River, Stream
14. Intermittent stream
15. Lake, Pond
16. Lagoon (Lag)
17. Marsh, Swamp
18. Slough (Slu)
19. Rapids
20. Waterfalls
21. Spring

D. Control Points

1	△	Triangulation point (station)
1a		Astronomic Station
1b	○	Fixed point (landmark, position accurate)
(Ba)	⊕	Fixed point (landmark, position approx.)
3	·256	Summit of height (Peak) (when not a landmark)
(Bh)	256	Peak, accentuated by contours
(Br)	256	Peak, accentuated by hachures
(Ba)	256	Peak, elevation not determined
(Br)	256	Peak, when a landmark
4	Obs Spot	Observation spot
×5	BM	Bench mark
6	View X	View point
7		Datum point for grid of a plan
8		Graphical triangulation point
9	Astro	Astronomical
10	Tri	Triangulation
(En)	Corps E	Corps of Engineers
12		Great trigonometrical survey station
13		Traverse station
14	Bdy Mon	Boundary monument
(Ba)	◇	International boundary monument

E. Units

1	hr.	Hour	14a		Greenwich
2	m. min	Minute (of time)	15	pub.	Publication
3	sec.	Second (of time)	16	Ed.	Edition
4	m.	Meter	17	corr.	Correction
4a	dm.	Decimeter	18	alt.	Altitude
4b	cm.	Centimeter	19	ht. elev.	Height, Elevation
4c	mm.	Millimeter	20	°	Degree
4d	m^2	Square meter	21	′	Minute (of arc)
4e	m^3	Cubic meter	22	″	Second (of arc)
5	km.	Kilometer	23	No.	Number
6	in.	Inch	(Ea)	St M	Statute mile
7	ft.	Foot	(Eb)	msec.	Microsecond
8	yd.	Yard	(Ec)	Hz	Hertz (cps)
9	fm.	Fathom	(Ed)	kHz.	Kilohertz (kc)
10	cbl.	Cable length	(Ee)	MHz.	Megahertz (Mc)
11	M.	Nautical mile	(Ef)	cps.	Cycles/second(Hz)
12	kn.	Knot	(Eg)	kc.	Kilocycle (kHz)
12a	t.	Ton	(Eh)	Mc.	Megacycle (MHz)
12b	cd.	Candela (new candle)			
13	lat.	Latitude			
14	long.	Longitude			

F. Adjectives, Adverbs and other abbreviations

1	gt		
2	lg		
3	sq		
4	med		
5			
6			
7	mod		
8			
9	ant		
10	bur		
11	Sil		
12			
13			
14	D. Dock		
15			
16	dist		
17	alt		
18			
19			
19a			
20	sub		
21			
22	Admty		
23			
23a			
24	expos		
25	dism		
26	prot		
27	explo		
28	estab		
29	elec		
30	priv		Privately
31	prom		
32	visib		
33	subm		
34	approx		
35			
36	manne		
37	aband		
38	temp		
39	recon		
40	exist		
41			
42	N M	Notice to Mariners	
(Ea)	L N M	Local Notice to Mariners	
43		Sailing Directions	
44		List of Lights	
(Ha)	universl	Universe	
(Ea)	auth	Authority	
(Ea)	co	Cinematic	
(Ea)	cor	Corner	
(Ea)	conc	Concrete	
(Ea)	fl	Flood	
(Ea)	mod	Moderate	
(Ea)	bet	Between	
(Eb)	1st	Fix	
(Eb)	2nd	Second	
(Eb)	3rd	Third	
(Eb)	4th	Fourth	
†(Eb)	DD	Deep Draft	
†(Ea)	min	Minimum	
†(Eb)	max	Maximum	

G. Ports and Harbors

1. Anchorage (large vessels)
2. Anchorage (small vessels)
3. Harbor
4. Haven
5. Port
6. Breakwater
6a. Dike
7. Mole
8. Jetty (partly below MHW)
8a. Submerged jetty
(Ga) Jetty (small scale)
9. Pier
10. Spit
11. Groin (partly below MHW)
12. Anchorage prohibited (See P-27) (Screen Opn)
12a. Anchorage reserved
12b. Quarantine anchorage
13. Spoil ground
(Gb) Dumping ground
(Gc) Disposal area
(Gd) Pumpout facilities
14. Fisheries, Fishing stakes
14a. Fish trap, Fish weir, (actual shape (to-scale))
14b. Duck blind
15. Tunny net, (See G-14a)
15a. Oys Oyster bed
16. Ldg. Landing place
17. Watering place
18. Wharf
19. Quay
20. Berm
20a. Anchoring berth
20b. 14
21. 3 Dol Dolphin
22. Bollard
23. Mooring ring
24. Crane
25. Landing stage
25a. Landing stairs
26. Quar. Quarantine
27. Lazaret
28. Harbor Master, Cust. Hs. Harbor master's office, Customhouse
29. Fishing harbor
30. Winter harbor
32. Refuge harbor
33. B Hb Boat harbor
34. Sheltering harbor, (uncovers at LW)
35. Dock
36. Dry dock (actual shape on large-scale charts)
37. Floating dock (actual shape on large-scale charts)
38. Gridiron, Careening grid
39. Patent slip, Slipway, Marine railway
39a. Ramp. Ramp
40. Lock (point upstream) (See H-13)
41. Wet dock
42. Shipyard
43. Lumber yard
44. Health Office, Hospital, Health officer's office
45. Hk Hulk (actual shape on lg scale charts) (See O-11)
46. PROHIBITED AREA Prohibited area (Screen Opnose)
46a. 10 Calling-in point for vessel traffic control
47. Anchorage for seaplanes
48. Seaplane landing area
49. Under construction Work in progress, Under construction
50. Work projected
51. Sube ruins Submerged ruins

H. Topography (Artificial Features)

1. Road (Rt) or Highway (Hy)
(Ba) Highway markers
2. Track, Footpath, in Trees
3. Pipeline (Pipe) or Radio Mast, Pipe (Mast) (See G-9)
3a. Tramway
3b. Railway (station or road)
3c. Tunnel (station or road)
3d. Embankment, Levee
3e. Cutting
3f. Causeway
4. Overhead power cable
5. Power transmission line
5a. Power transmission mast
6. Prominent telegraph or telephone line
7. Aqueduct, Water pipe
8. Viaduct
9a. Pipeline
9b. Pipe, Piping, Post (above MHW) (See I-10, G-9)
9c. Mast
10. Highway (See H-1)
11. Sewer
12. Culvert
13. Canal, Ditch, Lock, Sluice (point upstream)
14. Bridge (in general)
14a. Stone, concrete bridge
14b. Wooden bridge
14c. Iron bridge
14d. Suspension bridge
15. Drawbridge (in general)
16. Swing bridge
16a. Lift bridge
16b. Bridge (in general, in section)
17. Pontoon bridge
17a. Transporter bridge
18a. Bridge (clearance, vertical)
18b. Bridge (clearance, horizontal)
19. Ferry (Fy)
20. Ford
21. Dam
22. Fence
23. Training wall
24. Log boom

I. Buildings and Structures (see General Remarks)

1. City or Town (large scale)
1a. City or Town (sm. scale)
2. Suburb
3. Village
3a. Buildings (in general)
4. Casa
5. House
6. Kiln
7. Farm
8. Church
8a. Cathedral
8b. Spire, Steeple
9. Mosque (church)
10. Temple
11. Chapel
12. Minaret
12a. Minaret, Shrine
13. Monastery
14. Pagoda
15. Abandoned Temple
15a. Shinto Shrine
16. Monastery, Convent
17. Calvary, Cross
17a. Cemetery, Non-Christian
18. Cemetery, Christian
18a. Tomb
19. Fort (actual shape, to-scale)
20. Battery
21. Barracks
22. Powder magazine
23. Airplane landing field
24. Airport, large scale (See R-13)
(Bc) Airport, medium (small scale)
(Bd) Airport, auxiliary (small scale)
25. Mooring mast
26. Street
26a. Avenue
26b. Boulevard
27. Trail
28. Telegraph
28. Telegraph office
29. P O Post office
30. Govt Hs Government House
31. Town hall
32. Hosp. Hospital
33. Slaughterhouse
34. Magz. Magazine
34a. Warehouse, Storehouse
35. Monument
36. Cupola
37. Elevator, Lift
(Ba) Elev. Elevation, Elevated Shed
40. Ruins
41. Tower
(Ba) Abandoned lighthouse
42. Windmill
43. Watermill
43a. Windmotor
44. Chimney, Stack
45. Water tower, Standpipe
46. Oil tank
47. Factory
48. Brick kiln
49. Saw mill
50. Mine, Quarry
51. Well
52. Cistern
53. Tank
54. Norias
55. Fountain

I. Buildings and Structures (continued)

61. Inst. Institute
62. Establishment
63. Bathing establishment
64. Ct Ho Courthouse
65. Sch. School
66. H S High school
(Ba) Univ. University
66. Bldg. Building
67. Pav. Pavilion
68. Hut
69. Stadium
70. T Telephone
(Ba) Cable area, Cablehead
72. Gable
73. Wall
74. Pyramid
75. Pillar
76. Oil derrick
(Ba) Ltd Limited
(Ba) Apt. Apartment
(Ba) Cap. Capitol
(Ba) Co. Company
(Bn) Corp. Corporation
(Ba) Ctr. Landmark (position accurate)
(Ba) Landmark (position approximate)
(Ba) Radar Dome, Radar Radome

J. Miscellaneous Stations

1. Sta. Any kind of station
2. Sta. Station
3. C G Coast Guard station (Similar to Lifesaving Sta.)
(Ba) C G WILLIS SANDS Coast Guard station (when landmark)
4. LOOK TR Lookout station, Watch tower
5. Lifeboat station
6. L S Lifesaving station (See J-3)
Rkt. Sta. Rocket station
8. PIL STA Pilot station
9. Sig. Sta. Signal station
10. Sem. Semaphore
11. S. Sig. Sta. Storm signal station
Weather signal station
Nat Weather Service signal sta.
13. Tide signal station
14. Stream signal station
15. Ice signal station
16. Time signal station
16a. Manned oceanographic station
16b. Unmanned oceanographic station
17. Time ball
18. Signal mast
19. Flagstaff, Flagpole
19a. Flag tower
20. Signal
21. Observatory
22. Obsy. Office
(Ba) BELL Bell (or gong)
(Ba) BEACON Harbor entrance channel post

K. Lights (†) new optional symbol

1. Position of light
2. Light
(Ba) Rotating or occulting light
3. Lighthouse
4. Aeronautical light (See P-20)
4a. Marine aid or navigation light
5. Light beacon
6. Lighthouse, Lightship
7. Light vessel, Lightship
8. Fixed and flashing light
8a. Fixed and group flashing light
8b. Morse code light
9. Revolving or Rotating light
10. Period
11. Eclipse
12. Flash
13. Alternating light
14. Fixed light
15. Occulting light
16. Group occulting light
17. Isophase light
18. Quick flashing light
19. Group quick flashing light
20. Group flashing light
21. Interrupted quick flashing light
22. Group interrupted quick flashing light
23. Group flashing (2) light
24. Group flashing (3) light
25. Group flashing (4) light
26. Group flashing (5) light
27. Alternating group flashing light
28. Alternating group flashing (2) light
29. Alternating group flashing (3) light
30. Directional light
31. Vertical light
32. Horizontal light
33. Reflector
34. Lens
35. Air obstruction light
36. Aeronautical light
37. Beacon, Lighted
38. Lighted buoy
39. Lighted bell buoy
40. Lighted whistle buoy
41. Lighted gong buoy
42. Lighted horn buoy
43. Lighted whistle buoy
44. Radiobeacon (See M-1)
45. Leading lights
46. Sector light
47. Directional light
48. Range light
49. Fog detector light
50. Aero light
51. Air navigation light
52. Obstruction light
53. Flood light
54. Strip light
55. Spotlight
56. Searchlight
57. Moire effect light
58. Ultraviolet light
59. Infrared light
60. Emergency light
61. Temporary light
62. Private light
63. Non-synchronized light
64. Synchronized light
65. Code light
66. Lighted mooring buoy
67. Lighted dolphin
68. Lighted sewage outfall
69. Unwatched light
70. Ocean Occasional light
71. Coast Intermittent light
72. Tang Temporary light
73. Prov Provisional light
74. Alt Alternating light
75. Fixed light
76. Upper light
77. Lower light
78. Front light
79. Rear light
80. Vert Vertical lights
81. Hor Horizontal lights
82. Vis Vertical beam
83. Mid Middle light
84. Lower Lower light
85. Upper Upper light
86. Temporary light, replaced by lighted buoy, showing the same characteristic
87. Temporary light, replaced by unlighted buoy
88. Temporary lighted buoy
89. Lt B
90. Unlit

L. Buoys and Beacons (continued)

1. Starboard hand buoy
2. Port hand buoy
3. Temporary buoy (See L-4, L-5)
4. Mid-channel buoy
5. Junction buoy
6. Preferred channel buoy
7. Isolated danger buoy
8. Safe water buoy
9. Special purpose buoy
10. Diagonal beacon
11. Beacon
12. Cardinal marking system
13. Compass adjustment beacon
14. Topmarks (See L-9, 10)
15. Telegraph cable (landing) beacon
16. Flags (See O-30, H-9)
17. Stakes
18. Spar buoy
19. Can buoy
20. Nun buoy
21. Pillar buoy
22. Spherical buoy
23. Barrel buoy
24. Conical buoy
25. Can buoy
26. Nun buoy
27. Pillar buoy
28. Spherical buoy
29. Barrel buoy
30. Conical buoy
31. Can buoy
32. Nun buoy
33. Pillar buoy
34. Spherical buoy
35. Barrel buoy
36. Conical buoy
37. Can buoy
38. Nun buoy
39. Pillar buoy
40. Spherical buoy
41. Barrel buoy
42. Conical buoy
43. Can buoy
44. Nun buoy
45. Pillar buoy
46. Spherical buoy
47. Barrel buoy
48. Conical buoy
49. Can buoy
50. Nun buoy
51. Pillar buoy
52. Spherical buoy
53. Barrel buoy
54. Conical buoy
55. Can buoy
56. Nun buoy
57. Pillar buoy
58. Spherical buoy
59. Barrel buoy
60. Conical buoy
61. Can buoy
62. Nun buoy
63. Pillar buoy
64. Spherical buoy
65. Barrel buoy
66. Conical buoy
67. Can buoy
68. Nun buoy
69. Pillar buoy
70. Spherical buoy
71. Barrel buoy
72. Conical buoy
73. Can buoy
74. Nun buoy
75. Pillar buoy
76. Spherical buoy
77. Barrel buoy
78. Conical buoy
79. Can buoy
80. Nun buoy
81. Pillar buoy
82. Spherical buoy
83. Barrel buoy
84. Conical buoy
85. Can buoy
86. Nun buoy
87. Pillar buoy
88. Spherical buoy
89. Barrel buoy
90. Conical buoy

M. Radio and Radar Stations

1. R Sta Radio telegraph station
2. R T Radio telephone station
3. R Bn Radiobeacon
4. Circular radiobeacon
5. R D Directional radiobeacon
6. Rotating loop radiobeacon
7. R D F Radio direction finding station
8. Loran Sta
9. Decca Sta
10. Omega Sta
11. Tacan Sta
12. Racon
13. Ra Ref
14. Ra (compas)
15. D F S AERO R Bn 302
16. Decca Sta
17. Loran Sta
18. Omega
19. Tacan Sta
20. Racon
21. Ra Ref
22. Ra (compas)
23. D F S AERO R Bn 302
24. Decca Sta
25. Loran Sta
26. Omega
27. Tacan Sta
28. Racon
29. Ra Ref
30. Ra (compas)
31. D F S AERO R Bn 302
32. Decca Sta
33. Loran Sta
34. Omega
35. Tacan Sta
36. Racon
37. Ra Ref
38. Ra (compas)
39. D F S AERO R Bn 302
40. Decca Sta
41. Loran Sta
42. Omega
43. Tacan Sta
44. Racon
45. Ra Ref
46. Ra (compas)
47. D F S AERO R Bn 302
48. Decca Sta
49. Loran Sta
50. Omega
51. Tacan Sta
52. Racon
53. Ra Ref
54. Ra (compas)
55. D F S AERO R Bn 302
56. Decca Sta
57. Loran Sta
58. Omega
59. Tacan Sta
60. Racon
61. Ra Ref
62. Ra (compas)
63. D F S AERO R Bn 302
64. Decca Sta
65. Loran Sta
66. Omega
67. Tacan Sta
68. Racon
69. Ra Ref
70. Ra (compas)
71. D F S AERO R Bn 302
72. Decca Sta
73. Loran Sta
74. Omega
75. Tacan Sta
76. Racon
77. Ra Ref
78. Ra (compas)
79. D F S AERO R Bn 302
80. Decca Sta
81. Loran Sta
82. Omega
83. Tacan Sta
84. Racon
85. Ra Ref
86. Ra (compas)
87. D F S AERO R Bn 302
88. Decca Sta
89. Loran Sta
90. Omega

K. Lights (new optional symbol)

1		Fixed light	
2		Flashing light	
3		Occulting light	
4		Isophase light (equal interval)	
5		Quick flashing light	
6		Interrupted quick flashing light	
7		Long flashing light	
8		Group flashing light	
9		Group occulting light	
10		Group long flashing light	
11		Fixed and flashing light	
12		Fixed and group flashing light	
13		Flashing light	
14		Occulting light	
15		Alternating light	
16		Directional light	
17		Aeronautical light (See P-27)	
18		Air/surface navigation light	
19		Light beacon	
20		Lighthouse	
21		Leading lights	
22		Sector lights	
23		Directional light	
24		Harbor light	
25		Floating light (maintained by private interests, to be used with caution)	
26		Fixed light	
27		Occulting light	
28		Isophase light (equal interval)	
29		Quick flashing light	
30		Interrupted quick flashing light	
31		Short flashing light	
32		Alternating light	
33		Group occulting light	
34		Group flashing light	
35		Short-long flashing light	
36		Group short flashing light	

K. Lights (continued)

37		Fixed light	
38	Vert	Vertical lights	
39	Hor	Horizontal lights	
(K1)	VB	Vertical beam	
(K2)	RGE	Range	
(K3)	Exper	Experimental light	
(K4)	TRLB	Temporarily replaced by lighted buoy showing the same characteristics	
(K5)	TRUB	Temporarily replaced by unlighted buoy	
(K6)	TLB	Temporarily lighted buoy	
(K7)	TUB	Temporarily unlighted buoy	

L. Buoys and Beacons (see General Remarks)

1		Light buoy	
2	BELL	Bell buoy	
3	GONG	Gong buoy	
3a		Whistle buoy	
4		Can or Cylindrical buoy	
5		Nun or Conical buoy	
6		Spherical buoy	
7		Spar buoy	
8		Pillar or Spindle buoy	
9		Buoy with topmark (ball) (See L-7G)	
10		Barrel or Tun buoy	
(L1)		Color unknown	
11	FLOAT	Floats	
12	FLOAT	Lightfloat	
13		Color or Lateral buoy	
14		Fairway buoy (BWVS)	
14a		Mid-channel buoy (BWVS)	
15		Star-board-hand buoy (entering from seaward)	
16		Port-hand buoy (entering from seaward)	
17		Bifurcation buoy (IALA-A)	
18		Junction buoy (IALA-A)	
19		Isolated danger buoy (IALA-A)	
20		Wreck buoy (RBWB or G)	
20a		Obstruction buoy (IALA-A)	
21		Telegraph cable buoy	
22		Mooring buoy (for vessel not over 65 feet)	
22a		Mooring buoy with telephone connection	
22b		Mooring buoy with telephone and electric connection	
23		Warning buoy	
24		Quarantine buoy	
24a		Practice area buoy	
25	Explos anch	Explosive anchorage buoy	
25a	AERO	Aeronautical anchorage buoy	
26	Compass	Compass adjustment buoy	
27	Fish	Fish trap (area) buoy (BWVIB)	
27a		Spoil ground buoy	
28	Anch	Anchorage buoy (marks limits)	
29	Pvt. marks	Private aid to navigation (buoy) (maintained by private interests, use with caution)	

L. Buoys and Beacons (continued)

55		Cardinal marking system	
56	Compass Bn	Compass adjustment beacon	
57		Topmarks (See L-9, 70)	
58		Telegraph-cable (landing) beacon	
59	Piles Piles	Piles (See O-30, H-9)	
	Stakes	Stakes	
	Stumps	Stumps (See O-30)	
		Perches	
61	CAIRN Cairn	Cairn	
62		Painted patches	
63	TR	Landmark (position accurate) (See D-2)	
(L4)	obstr	Landmark (position approximate)	
64	REF	Reflector	
65	MARKER	Range targets, markers	
(La)		Special-purpose buoys	
66		Oil installation buoy	
67		Drilling platform (See D-0a, D-0c)	
70	Note:	TOPMARKS on buoys and beacons may be shown on charts of foreign waters. The abbreviation for black is not shown adjacent to buoys or beacons.	
(L1)	Ra Refl	Radar reflector (See M-13)	

M. Radio and Radar Stations

1	R Sta	Radio telegraph station	
2	R T	Radio telephone station	
3	R Bn	Radiobeacon	
4	R Bn	Circular radiobeacon	
5	R D	Directional radiobeacon: Radio range	
6		Rotating loop radiobeacon	
7	R D F	Radio direction finding station	
(Ma)	TELEM ANT	Telemetry antenna	
(Mb)	R RELAY MAST	Radio relay mast	
(Mc)	MICRO TR	Microwave tower	
8	R MAST / R TR	Radio mast / Radio tower	
9a	TV TR	Television mast/Television tower	
9.10	VOR TACAN (200) MHz	Radio broadcasting station (commercial)	
10a	R Sta	Q.T.G. Radio station	
11	Ra	Radar station	
12	Racon	Radar transponder beacon	
13	Ra Ref	Radar reflector (See L-47)	
14	Ra (conspic)	Radar conspicuous object	
14a		Remark	
15	D F S	Distance finding station (synchronized signals)	
16	AERO R Bn 302	Aeronautical radiobeacon	
17	Decca Sta	Decca station	
18	Loran Sta Variable	Loran station (name)	
19	CONSOL Bn 190 AMp MNM	Consol (Consolan) station	
(Md)	AERO R Rge 342	Aeronautical radio range	
(Me)	Ra Ref Calibration Bn	Radar calibration beacon	
(Mf)	LORAN TR SPRING ISLAND	Loran tower (name)	
(Mg)	R TR F & L L	Obstruction light	

N. Fog Signals

1	Fog Sig	Fog signal station	
2		Radio fog-signal station	
3	Explos	Explosive fog signal	
4		Submarine fog signal	
5	SUB BELL	Submarine fog bell (section of waves)	
6	SUB BELL	Submarine fog bell (mechanical)	
7	SUB OSC	Submarine oscillator	
8	NAUTO	Nautophone	
9	DIA	Diaphone	
10	GUN	Fog gun	
11	SIREN	Fog siren	
12	HORN	Fog trumpet	
13	HORN	Fog horn	
13a	HORN	Electric fog horn	
14	BELL	Fog bell	
15	WHIS	Fog whistle	
16	HORN	Reed horn	
17	GONG	Fog gong	
18		Submarine fog signal not connected to the shore (See N-1, N-2)	
18a	Explos	Submarine fog signal connected to the shore (See N-1, N-2)	
(Na)	HORN	Typhon	
(Nb)	Fog Det Lt	Fog detector light (See K-68a)	

O. Dangers

1	Rock which does not cover, height above Sfc(H) (See General Remarks)	11	Wreck showing any portion of hull or superstructure (above sounding datum)
	Uncov 2 ft		Masts
2	Rock which covers and uncovers, with height in feet above chart sounding datum	12	Wreck with only masts visible (above sounding datum)
3	Rock awash at (mean) level of chart sounding datum	13	Old symbols for wrecks
	Dotted line emphasizes danger to navigation	13a	Wreck always partially submerged
(13a)	Rock awash (height unknown)	14	Sunken wreck dangerous to surface navigation (less than 11 fathoms over wreck) (See O-6a)
	Dotted line emphasizes danger to navigation		Wk
4	Sunken rock (height unknown)	15	Wreck over which depth is known
	Dotted line emphasizes danger to navigation		Wk
5	Sfsal sounding on isolated rock	15a	Wreck with depth cleared by wire drag
5a	Sunken rock not dangerous to surface navigation (See O-4)		Wk
	Rk Wk Obstr	16	Sunken wreck, not dangerous to surface navigation
6a	Sunken danger with depth cleared by wire drag (in feet or fathoms)		Foul
	Reef	17	Foul ground
7	Reef of unknown extent		Tide Rips
	Sub Vol	18	Overfalls or Tide rips
8	Submarine volcano		Eddies
	Discol Water	19	Eddies
9	Discolored water		Kelp
	Coral Rk Wk	20	Kelp, Seaweed
10	Coral reef, detached (uncovers at sounding datum)	21	Rk Blank
	Coral or Rocky reef, covered at sounding datum (See A-16, 17)	22	Sht Shoal
		23	Rf Reef (See A-11d,g,O-10)
		23a	Ridge
		24	Le Ledge
		25	Breakers (See A-12)
		26	Sunken rock (See O-4a)
			Obstn
		27	Obstruction
			Submerged Well
			Submerged Wall (buoyed)

	Obstruction (Fish haven)
	Fish haven (fishing reef)
28	Wreck (See O-11 to 15)
	Wreckage Wks
29	Wreckage
29a	Wreck remains (dangerous only for anchoring)
	Submpiles
30	Submerged piling (See H-9, L-59)
	Snags Stumps
30a	Snags, Submerged stumps (See L-59)
31	Lesser depth possible
32	Uncov Drifts (See A-10, O-2, 10)
33	Cov Covers (See O-2, 10)
34	Uncov Uncovers (See A-10, O-2, 10)
	Rep (1958)
	Reported (with date)
	Eagle Rk (rep 1958)
35	Reported (with name and date)
36	Discol Discolored (See O-9)
37	Isolated danger
38	Limiting danger line
39	Limit of rocky area
41	P.A Position approximate
42	P.D Position doubtful
43	E.D Existence doubtful
44	P.Pos Position doubtful
45	D Unsurveyed
46	Le Ledge
(Oa)	Subm Cbl Crib (above water)
(Ob)	Crib
	Platform (lighted) HORN
(Oc)	Offshore platform (unnamed)
	Platform (lighted) HORN
(Od)	Offshore platform (named)

P. Various Limits, etc.

1		Leading line, Range line	
2		Transit	
3		In line with	
4		Limit of sector	
5		Channel, Course, Track (recommended (marked by Buoys or Beacons)) (See P-7a)	
(P5a)		Alternate course	
6		Radar guided track	
7		Submarine cable (power, telegraph, telephone, etc.)	
7a		Submarine cable area	
7b		Abandoned submarine cable (includes disused cable)	
(P8)		Submarine pipeline	
8a	Pipeline Area	Submarine pipeline area	
9		Maritime limit or general	
(P9)		Limit of restricted area	
10		Limit of fishing zone (fish trap areas)	
(P)		U.S. Harbor Line	
11		Limit of dumping ground, spoil ground (See P-9, L-21)	
12		Anchorage limit	
13		Limit of airport (See I-21, 24)	
13a		Limit of military practice areas	
14		Limit of sovereignty (Territorial waters)	
15		Customs boundary, international boundary (also State boundary)	
16		Stream limit	
17		Ice limit	
18		Limit of tide	
19		Limit of navigation	
20		Course recommended (not marked by buoys or beacons)	
21		Distinct or prominent line	
22		Reservation line	
23		(Options)	
24	COURSE DISTANCE TABLE MARKERS MARKERS	Measured distance	
25		Projected area (See O-2, 4b) (Screen Optional)	
(P25)	SAFETY FAIRWAY	Shipping safety fairway	
(P26)		Directed traffic lanes	

Q. Soundings

1	30	Doubtful sounding	
2	40	No bottom found	
3		Out of position	
4		Least depth in narrow channels	
5	30 ft 12 ft MHW MLW	Dredged channel (with controlling depth indicated)	
6	24 ft MLW	Dredged area	
7		Swept channel (See Q-9)	
8	6	Drying (or uncovering) heights, or feet above chart (sounding) datum	
9	29 23	Swept area, not adequately sounded (shown by green tint)	
9a	29 23	Swept area adequately sounded (swept by wire drag to depth indicated)	
10		Hair-line depth figures	
11a	h_1 r_9	Figures for ordinary soundings	
11	h_1 r_9	Soundings taken from older surveys (or shading scale shoal)	
12	h_1 r_9	Echo soundings	
13	h_1 r_9	Sloping figures (See Q-12)	
14	h_1 r_9	Up-right figures (See Q-13a)	
15	h_1 r_9	Bracketed figures (See Q-1, 2)	
16	6	Underlined sounding figures (See Q-8)	
17	h_1 r_9	Soundings expressed in fathoms and feet	
18		Unsounded area	
19		Stream	

R. †Depth Contours and Tints (see General Remarks)

Feet	Fms. Meters
0	0
6	1
12	2
18	3
24	4
30	5
36	6
60	10
120	20
180	30
240	40

Feet	Fms. Meters
300	50
600	100
1,200	200
1,800	300
2,400	400
3,000	500
6,000	1,000
12,000	2,000
18,000	3,000

(Blue or black) (Blue)

(Contours may be shown with values)

S. Quality of the Bottom

1	Grd	Ground	24	Cl.	Oysters
2	S	Sand	25	M	Mussels
3	M	Mud, Muddy	26	Spic	Spicul
4	Oz	Ooze	27	A	Algae
5	Mc	Marl	28	Wd Seaw	Seawee
6	Cl	Clay		Grs	Grass
7	G	Gravel	29	Stg	Seagrass
8	Sn	Shingle	31	Spc	Specimens
9	P	Pebbles	32	Fr	Foraminifera
10	Sr	Stones	33	Gl	Globigerina
11	Rk Rky	Rock, Rocky	34	Dt	Diatoms
11a	Bldr	Boulders	35	Rd	Radiolaria
12	Ch	Chalk	36	Pt	Pteropods
12a	Ca	Calcareous	37	Py	Polyzoa
13	Qz	Quartz	38	C	Corncrete
13a	Sch	Schist	38a	Fc	Fucus
14	Co	Coral	38b	Mr	Marine
14a	Co Hd	Coral head	39	fne	Fine
15	Mds	Madreporites	40	crs	Coarse
16	Vol	Volcanic	41	stf	Stiff
16a	Vol Ash	Volcanic ash	42	hrd	Hard
17	La	Lava	43	stf	Stiff
18	Pm	Pumice	44	smt	Smooth
19	T	Tufa	45	lrg	Large
20	Sc	Scoriae	46	stk	Sticky
21	Cn	Cinders	47	brk	Broken
21a		Ash	47a	rck	Rocky
22	Mn	Manganese	48	f	Rotten
23	Sh	Shells	49	r	Streaky
50	sft	Soft			
51	gty	Gritty			
52	dec	Decayed			
53	fly	Flinty			
54	glac	Glacial			
55	ten	Tenacious			
56	wh	White			
57	bk	Black			
58	vi	Violet			
59	bu	Blue			
60	gn	Green			
61	yl	Yellow			
62	or	Orange			
63	rd	Red			
64	br	Brown			
65	ch	Chocolate			
66	gy	Gray			
67	lt	Light			
68	dk	Dark			
70	vard	Varied			
71	unev	Uneven			
(Sc)	S/M	Surface layer and Under layer			
76		Fresh water springs in sea bed			

T. Tides and Currents

1	HW	High water
1a	HHW	Higher high water
2	LW	Low water
(Ta)	LWD	Low water datum
2a	LLW	Lower low water
3	MTL	Mean tide level
4	MSL	Mean sea level
4a		Elevation of mean sea level above chart (sounding) datum
5		Mean tide level (chart datum for sounding reductions)
6	Sig	Sailing rate
7	No	Neap rate
7a	MHW	Mean high water
8	MHWS	Mean high water springs
8a	MHWN	Mean high water neaps
9	MHHW	Mean higher high water
9a	MLW	Mean low water
9b	MLWS	Mean low water springs
9c	MLWN	Mean low water neaps
10	LLW	Mean lower low water
11		Highest spring low water
		High water full and change (establishment of the port)
12		Low water full and change
13		Mean establishment of the port
13a		Establishment of the port
14		Unit of height
15		Equinoctial
16		Quarter, Quadrature
17	Str	Stream
18	3kn	Current general, with rate
19	2kn	Flood stream (current) with rate
20	1kn	Ebb stream (current) with rate
21	tide gauge	Tide gauge, Tidepole, Automatic tide gauge
23	vel	Velocity, Rate
24	kn	Knots
25	ht	Height
26		Tide
27		New moon
28		Full moon
29		Diurnal
30		Synodic
31	Fl	Flood
32		Ebb
33		Tide stream diagram
34		Place for which tabulated tide-stream data are given
35		Range (of tide)
36		Phase lag
(T3a)		Current diagram, with explanatory note

U. Compass

Compass Rose

The outer circle is in degrees with zero at true north. The inner circles are in points and are used with the arrow indicating magnetic north.

1	N	North
2	E	East
3	S	South
4	W	West
5	NE	Northeast
6	SE	Southeast
7	SW	Southeast
8	NW	Northwest
9	N	Northern
10	E	Eastern
11	S	Southern
12	W	Western
21	brg	Bearing
22	T	True
23	mag	Magnetic
24	var	Variation
25		Annual change
25a		Annual change not
26		Abnormal variation, Magnetic anomaly
27	deg	Degrees (See E-20)
28	dev	Deviation

FOR ARGUMENT

FILED
DEC 21 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 75-1775.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JACK B. WESTCOTT,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief for the Respondent.

GEORGE M. VETTER, JR.,
HINCKLEY, ALLEN, SALISBURY & PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.
(401) 274-2000

Of Counsel:
NANCY HALL MCMILLEN,
HINCKLEY, ALLEN, SALISBURY & PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.

Attorneys for the Respondent.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Brief for the Respondent.

Opinions Below.

The majority and dissenting opinions of the Supreme Judicial Court (A. 11-26) are reported at Mass. Adv. Sh. (1976) 696-716 and 344 N.E. 2d 411-419.

Jurisdiction.

The Supreme Judicial Court entered a judgment on March 12, 1976, declaring a statute of Massachusetts unconstitutional (A. 2). The Commonwealth of Massachusetts filed a petition for a writ of certiorari on June 7, 1976. This Court granted the writ on October 4, 1976 (A. 2). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

Statute Involved.

The Act of February 20, 1923, Ch. 35, 1923 Mass. Acts and Resolves 17, *as amended by* the Act of March 13, 1962, Ch. 219, 1962 Mass. Acts and Resolves 107:

> "It shall be unlawful during the months of July, August and September for any person who has not been a legal resident of this commonwealth during the preceding year to use beam or otter trawls to drag for fish in that part of the waters of Vineyard Sound lying in the towns of Chilmark, Gay Head and Gosnold, and included between an imaginary line running from the extreme western point of Gay Head to the extreme western point of Nashawena Island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light. Violation of this act shall be punished by a fine of not less than five hundred nor more than one thousand dollars."

Question Presented.

Does Chapter 35 of the Massachusetts Acts of 1923 violate the privileges and immunities clause of Article IV, § 2, of the United States Constitution by making it unlawful for non-residents but not for residents of the state to drag for fish by beam or otter trawl in Vineyard Sound during July, August, and September?

Statement of the Case.

On September 5, 1973, Jack B. Westcott was arrested by an officer of the Massachusetts Department of Natural Resources for violating Chapter 35 of the Acts of 1923, as amended (A. 4).

That statute makes it unlawful for a person who has not been a resident of Massachusetts during the preceding year to drag for fish by beam or otter trawl during July, August, and September in Vineyard Sound.

When he was arrested Westcott was dragging for fish, namely scup and fluke, by otter trawl in the SUZANNE in Vineyard Sound (A. 4-5).

The waters of Vineyard Sound are navigable waters of the United States (A. 5).

Scup and fluke are migratory fish (A. 4).

The SUZANNE was registered out of Point Judith, Rhode Island, and was owned without the Commonwealth of Massachusetts (A. 4-5).

Westcott had not been a legal resident of Massachusetts for the year preceding the date of his arrest, or for the year preceding July 1, 1973. He was then and is now a resident of Narragansett, Rhode Island (A. 5).

On September 7, 1973, the Natural Resources officer swore out a criminal complaint against Westcott charging violation of the statute. Westcott pleaded not guilty (A. 2-3).

On April 24, 1974, Westcott was tried, found guilty, and fined $500 in the District Court of Dukes County (A. 4). On April 26, 1974, he appealed to the Superior Court of Dukes County for *de novo* review (A. 4).

On May 14, 1974, Westcott's case was called for trial in the Superior Court (A. 1). He moved to dismiss the complaint on the grounds that the statute violated the privileges and immunities and equal protection clauses of the United States Constitution (A. 7-8). At the hearing on the motion, the parties submitted to the court an agreed statement of facts (A. 4-7).

The Superior Court conducted no trial and reserved decision on the motion. On May 23, 1974, it reported two questions to the Appeals Court: Whether the statute violated the privileges and immunities clause by imposing differential treatment between fishermen who are residents of Massachusetts and those who are not? Whether the criteria for legal residence in Massachusetts during the preceding year as provided in the statute violated the equal protection clause? (A. 9-10.)

On May 15, 1975, the Supreme Judicial Court granted direct appellate review (A. 2). On March 12, 1976, it held, with one judge dissenting, that the statute violated the privileges and immunities clause, and remanded the case to the Superior Court with instructions to allow Westcott's motion to dismiss. The court did not pass on Westcott's equal protection claim (A. 11-26).

The parties stipulated to certain further facts in the agreed statement of facts.

They agreed that the waters covered by two other Massachusetts statutes, Chapter 158 of the Acts of 1936, as amended, and Section 99 of Chapter 130 of the General Laws, as

amended, were also navigable waters of the United States (A. 5).

Chapter 158 prohibits a nonresident of Massachusetts from taking fish by otter trawl in Vineyard and Nantucket Sounds at any time (A. 6-7).

Section 99 forbids any vessel owned without Massachusetts other than a common carrier from carrying fish taken in coastal waters out of Massachusetts, and provides that any person in such a vessel who takes fish for that purpose shall be fined and the catch forfeited (A. 7).

The parties also agreed that if called as a witness Westcott would testify as follows: That the waters covered by all three statutes are good areas for fishing for migratory fish such as scup and fluke by beam and otter trawl; that the freedom throughout the year to fish in and to carry his catch out of those waters and any coastal waters of Massachusetts in a vessel owned without Massachusetts and which is not a common carrier is a valuable right to him (A. 5).

Summary of Argument.

This case is identical to *Toomer* v. *Witsell*, 334 U.S. 385 (1948). That case held that commercial fishing in the marginal sea is a privilege and immunity of citizenship. It declared a South Carolina statute excluding nonresidents from fishing for free-swimming migratory fish in the marginal sea for the sole reason that they are nonresidents to be unconstitutional. On the authority of *Toomer*, the Massachusetts statute, identical in all respects, is likewise unconstitutional.

Massachusetts contends that *Toomer* is no longer good law if it ever was. Massachusetts says that *Toomer* was a judicial sport, and that in any event it has been undermined by the

Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.* Consequently, it concludes that the antique special public interest doctrine of *McCready* v. *Virginia*, 94 U.S. 391 (1876), applies to this case: *i.e.*, that the right of a state citizen to hunt and fish rests on his collective ownership of game, not his state citizenship, and hence is not a privilege of state citizenship guaranteed to citizens of other states.

The arguments are not well taken and the contention fails.

In *Toomer*, discriminatory state statutes had led to a partitioning of the shrimp fishery off the Southern coast along state lines. This hindered optimum methods of fishing. It deprived citizens of one state from doing business in another state on a substantially equal basis with citizens of that state. The severity of the discrimination bore no reasonable relationship to the evil, real or feigned, posed by nonresidents.

The public interest doctrine of *McCready* did not apply for two reasons. The free-swimming migratory fish of *Toomer* are not susceptible of ownership, unlike stationary creatures such as the oysters of *McCready*. *Toomer* involved the marginal sea whereas *McCready* involved a tidal river. Anyway, the ownership doctrine was never anything more than a legal fiction to explain a state's control of and need to control its wildlife. There is no conflict between that control and the need to exercise that control consistent with constitutional guarantees. The police power is the modern management tool.

Many decisions have followed *Toomer*. The recent case of *Kleppe* v. *New Mexico*, 96 S. Ct. 2285 (1976), reaffirmed it in all respects. So, far from being a derelict of the law, *Toomer* is alive and vital. Furthermore, constitutional rights no longer turn on the privilege-right distinction. *Graham* v. *Richardson*, 403 U.S. 365 (1971). And there are other reasons why Massachusetts' attack on *Toomer* is not sound.

As for the Submerged Lands Act of 1953, it could only grant what the United States had. The United States did not own free-swimming migratory fish. The Act could not create such ownership since such ownership is inherently impossible. The ownership language of the Act must be construed as a legal fiction for the need of a state to control its wildlife. The legislative history bears this out. 99 Cong. Rec. 2533-2564 (1953).

Massachusetts' position is also wrong in policy. It would again lead to a feudal situation in commercial fishing in the marginal sea. It would cause concentration of the industry in states with long shorelines. It would unsettle the law in other areas by reintroducing the right-privilege distinction. It would undercut the utility of the police power as a management tool of the states' natural resources. The police power better serves as a management tool because it better harmonizes with other constitutional provisions.

At bottom, Massachusetts misconceives the issue. The issue is not the source of the power to control, but that control, whatever its source, be exercised consistent with constitutional guarantees.

Argument.

I. Commercial Fishing in the Marginal Sea is a Privilege and Immunity of Citizenship so that under Toomer v. Witsell the Massachusetts Statute is Unconstitutional Because it Discriminates Against Citizens of Other States Solely on the Ground that They are Citizens of Other States.

1. Massachusetts is in the same position as South Carolina was in *Toomer* v. *Witsell*, 334 U.S. 385 (1948). The facts

and statutes in both cases are identical. The arguments made to support the statutes are the same. The Court rejected those arguments in *Toomer*. That case controls unless there is something else.

Massachusetts says there is something else. It says *Toomer* is no longer good law if it ever was. It characterizes the case as out of the mainstream of the law, a judicial sport. Besides, it says, the case has been undermined by the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq*. With *Toomer* out of the way, Massachusetts argues, the Court can return to the mainstream doctrine of special public interest articulated in *McCready* v. *Virginia*, 94 U.S. 391 (1876), which *Toomer* explicitly refused to follow, and *Geer* v. *Connecticut*, 161 U.S. 519 (1896).

The special public interest doctrine harks back to ancient law about control and possession of animals *ferae naturae*. Without tracing the modifications of the doctrine throughout the years, suffice it to say that, when it was received in this country, it was suitably modified for a free people. Massachusetts opts for the following version of the doctrine:

> The citizens of a state own the wildlife of the state, whether migratory or not, in common. The government of the state, as a sort of trustee, exercises this ownership for the benefit of all its citizens, which includes discriminating against persons lacking this beneficial interest. Thus the right of state citizens to hunt or fish within the state is a property right and not a privilege or immunity of state citizenship guaranteed by the Constitution to citizens of other states.

Massachusetts waffles as to whether this formula is or should be the law. But it is firm in another respect: it altogether avoids discussing the weighty constitutional considerations underpinning the decision in *Toomer*. A glimpse of that remarkable case obviously is in order.

2. In *Toomer* a South Carolina statute required nonresidents to pay a fee one hundred times greater than that paid by residents for a license to shrimp commercially in the three-mile maritime belt off the coast of that state.

The South Carolina fishery was part of a larger fishery extending from North Carolina to Florida. The shrimp were migratory. Shrimpers preferred to follow the shrimp from the Carolinas as they migrated south along the coast. Each of the bordering states sought for its residents the opportunity to shrimp in this optimum way. Some of the states, however, appeared more concerned with channeling to their own residents the business derived from local waters. Hence, statutes such as that of South Carolina. The restrictions on nonresident fishing by one state led to retaliation by other states. The point was reached where the larger fishery became partitioned at state lines.

This is the untoward situation the Court faced. It could not square the situation with the privileges and immunities clause.

The Court first dealt with fundamental principles.

> The purpose of the clause was to fuse the sovereign states into a nation. Without it, the Court said, citing *Paul* v. *Virginia*, 8 Wall. 168 (1868), nationhood would not have come about. One specific privilege the clause guaranteed was that citizens of state A could do business in state B on substantially equal terms with citizens of that state. *Ward* v. *Maryland*, 12 Wall. 418 (1870). 334 U.S. at 395-396.

The clause bars discrimination against citizens of other states based substantially on the mere fact of noncitizenship. It does not preclude disparity of treatment where there are valid, independent reasons for it. The inquiry is whether such reasons exist, and whether the degree of discrimination bears a close relation to them. 334 U.S. at 396.

The Court then made this inquiry.

The South Carolina statute virtually excluded nonresidents. That it would curb excessive trawling, its putative conservation purpose, seemed doubtful because it did not limit the number of resident boats. But, in any event, to assume that any means can be adopted to attain valid objectives overlooks the purpose of the clause, which is "to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." 334 U.S. at 398.

South Carolina mentioned, but did not try to prove, that the fishing methods and size of boats of nonresidents, and the greater cost of enforcing laws against them, constituted a peculiar evil. The record did not bear this out. Even if it did, the state had other remedies — restricting types of equipment, basing fees on boat size or on the differential in enforcement costs — short of virtual exclusion. There was thus no reasonable relationship between the dangers noncitizens posed and the severe discrimination visited on them. Consequently, the statute was unconstitutional unless commercial shrimp fishing in the maritime belt fell within some unexpressed exception to the privileges and immunities clause. 334 U.S. at 399.

At this point, the Court took up the public interest doctrine as a possible exception.

The Court analyzed the doctrine, and said it frequently had used language supporting that analysis. In only one case, though, the *McCready* case, had it used the doctrine to uphold state action discriminating against commercial hunting or fishing by noncitizens without persuasive independent reasons to justify the discrimination. In that case, the statute prohibited nonresidents from planting oysters in a tidal river. 334 U.S. at 399-401.

The Court then noted two distinctions between the *McCready* case and the *Toomer* case. One was between

stationary oysters and free-swimming migratory fish. The other was between the regulation of fishing in inland waters and in the marginal sea. 334 U.S. at 401.

Based on this, the Court viewed *McCready*, on the one hand, as a single exception to the privileges and immunities clause, and *Toomer*, on the other hand, as a case not falling directly into the exception. The question, therefore, was whether the reasons for the exception called for its extension to a case with these factual distinctions. 334 U.S. at 401.

The Court said the very facts distinguishing *Toomer* made the ownership theory a weak prop for the South Carolina statute.

The free-swimming migratory nature of shrimp made it doubtful if they could be owned, the Court said, quoting *Missouri* v. *Holland*, 252 U.S. 416, 434 (1920): "To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership." Also, only fifteen years after *McCready*, in *Manchester* v. *Massachusetts*, 139 U.S. 240, 265 (1891), the Court had indicated the *McCready* rule might not apply to free-swimming fish.

Similarly, the Court said, the applicability of the ownership doctrine was doubtful because, though the states could regulate within the three-mile belt, they did not own that belt, citing *United States* v. *California*, 332 U.S. 19 (1947). 334 U.S. at 401-402.

The Court in *Toomer* then made this key comment:

> "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.[37] And there is no necessary conflict between that vital policy consideration and the constitutional com-

mand that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States." *Id.* at 402.

The footnote (37) explained that the fiction arose through a confusion between *imperium*, or governmental power to regulate, and *dominium*, or ownership; power over fish and game originated in *imperium*.

The Court refused to expand the *McCready* exception. It held that commercial shrimping in the marginal sea, like other common callings, is within the privileges and immunities clause. For the reasons it had previously given, it struck the statute as unconstitutional.

3. The facts in the *Toomer* case and this case are identical. Both cases involve: free-swimming migratory fish; commercial fishing; attempted state regulation in the marginal sea; statutes excluding nonresidents but not residents; fallacious justifications of the statutes as conservation measures to limit fishing; no showing that nonresidents presented a peculiar evil; the lack of a reasonable relationship between even suppositious evils of nonresidents and the severe discrimination against them.

There is one difference between the cases. South Carolina at least made a stab at reasons to justify the discrimination. Massachusetts does not even try.

The *Toomer* case has been treated as controlling in cases like this one. *Brown* v. *Anderson*, 202 F. Supp. 96, 102-103 (D. Alas. 1962); *Gospodonovich* v. *Clements*, 108 F. Supp. 234, 237 (E.D. La. 1951), *appeal dismissed*, 344 U.S. 911 (1953); *Edwards* v. *Leaver*, 102 F. Supp. 698, 703 (D. R.I. 1952); *Russo* v. *Reed*, 93 F. Supp. 554, 559-560 (D. Me. 1950); *Steed* v. *Dodgen*, 85 F. Supp. 956, 958 (W.D. Tex.

1949); *Dobard* v. *State*, 149 Tex. 332, 342 (1950). Cf. *Mullaney* v. *Anderson*, 342 U.S. 415, 417 (1952); *Schakel* v. *State*, 513 P. 2d 412, 414 (Wyo. 1973). Similar decisions have been made under the equal protection clause. *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410, 421 (1948); *Edwards* v. *Leaver*, *supra*.

II. Massachusetts' Attacks on Toomer v. Witsell are Not Well Taken.

1. Massachusetts attacks *Toomer* as constitutionally invalid or as no longer vital. Both positions are wrong. The Court said as much in *Kleppe* v. *New Mexico*, *supra*, less than a year ago.

That case involved the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331 *et seq.*, enacted to protect those animals on public lands. The New Mexico Livestock Board seized 19 unbranded burros on public lands, and sold them at auction. The Federal Bureau of Land Management demanded the Board recover and return the burros to the public lands. New Mexico attacked the constitutionality of the statute before a three-judge District Court.

The District Court held the statute unconstitutional on the ground that the state had a special public interest in wildlife within its borders based upon that ownership of wildlife. The District Court said that though *Toomer* v. *Witsell* had characterized the ownership doctrine as a legal fiction, the doctrine had never been abrogated. 406 F. Supp. 1237, 1238 (D. N.M. 1975).

This Court held the Act constitutional under the property clause of the Constitution, Art. IV, § 3, cl. 2. The Court handled the special public interest doctrine as follows:

"Appellees' contention that the Act violates traditional state power over wild animals stands on no different footing. Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions. *Toomer* v. *Witsell*, 334 U.S. 385, 402, 68 S.Ct. 1156, 1165, 92 L.Ed. 1460 (1948); *Lacoste* v. *Dept. of Conservation*, 263 U.S. 545, 549, 44 S.Ct. 186, 187, 68 L.Ed. 437 (1924); *Geer* v. *Connecticut*, 161 U.S. 519, 528, 16 S.Ct. 600, 604, 40 L.Ed. 793 (1896). But as *Geer* v. *Connecticut* cautions, those powers exist only 'in so far as [their] exercise may not be incompatible with, or restrained by, the rights conveyed to the federal government by the constitution.' 161 U.S., at 528, 16 S.Ct., at 604. 'No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of [wildlife], but it does not follow that its authority is exclusive of paramount powers.' *Missouri* v. *Holland*, 252 U.S. 416, 434, 40 S.Ct. 382, 384, 64 L.Ed. 641 (1920). Thus, the Privileges and Immunities Clause, U.S. Const., Art. IV, § 2, cl. 1, precludes a State from imposing prohibitory licensing fees on nonresidents shrimping in its waters, *Toomer* v. *Witsell*, *supra*; the Treaty Clause, U.S. Const., Art. II, § 2, permits Congress to enter into and enforce a treaty to protect migratory birds despite state objections, *Missouri* v. *Holland*, *supra*; and the Property Clause gives Congress the power to thin overpopulated herds of deer on federal lands contrary to state law. *Hunt* v. *United States*, *supra* [278 U.S. 96 (1928)]. We hold today that the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding." 96 S.Ct. at 2294-2295.

Two crucial points emerge. The Court based state authority over wild animals upon trustee and police powers, not ownership. It included the privileges and immunities clause, citing *Toomer*, along with the treaty clause, citing *Missouri* v. *Holland*, *supra*, and the property clause, citing *Hunt* v. *United States*, 278 U.S. 96 (1928), as examples of the type of paramount federal power to which state power over game, regardless of the source of that state power, has always been subject.

We think *Kleppe* blunts Massachusetts' attack on the validity and vitality of *Toomer*. But even if *Kleppe* did not exist, the attack fails for several other reasons.

Constitutional rights no longer turn upon whether a governmental benefit is characterized as a right or as a privilege. *Graham* v. *Richardson*, 403 U.S. 365, 374 (1971), which cited *Takahashi* v. *Fish & Game Comm'n*, *supra*, as casting doubt on the distinction as applied to free-swimming fish in the ocean off the California coast. Hence the right-privilege distinction upon which the special public interest doctrine rests no longer exists. See *Sugarman* v. *Dougall*, 413 U.S. 634, 644 (1973).

Also, Massachusetts' position is inherently contradictory. It would be strange indeed if a state could exclude residents from fishing in the marginal sea under a rejuvenated *McCready* but not be able to exclude aliens from doing so under a still vigorous *Takahashi*. There is, of course, no contradiction between *Toomer* and *Takahashi* (which in itself we submit would invalidate the Massachusetts statute).

All of the wild-animal cases Massachusetts cites predate *Toomer*. We can assume the *Toomer* Court considered them. But whether it did or not is really immaterial. The Court understood and rejected the special public interest doctrine. Furthermore, all of the cases except the *McCready* case are irrelevant on the discrimination issue.

Nor is *Toomer* an isolated, sudden, and radical break with the past. In prior cases the Court had pitched the authority of states over wildlife not on state ownership but on the state police power, which is subject to paramount federal power. *Skiriotes* v. *Florida*, 313 U.S. 69, 75 (1941); *Manchester* v. *Massachusetts*, *supra*. Massachusetts may wish *Toomer* were not in the mainstream of the law, but emphatically it is.

Finally, Massachusetts says *Toomer* supports the migratory-stationary distinction with only two authorities, *Missouri* v. *Holland*, *supra*, and *Manchester* v. *Massachusetts*, *supra*, which Massachusetts characterizes as meager. To call such illustrious cases meager smacks of rhetoric, not reason. Besides, there is other authority for this hoary distinction. See *McKee* v. *Gratz*, 260 U.S. 127 (1922).

2. The heart of Massachusetts' case is that the Submerged Lands Act of 1953 undercuts *Toomer*. The Act declared that title to the natural resources, including fish, within the navigable waters of the states vested in the states.

Massachusetts says that the Act affects *Toomer* in two ways. The Act abolishes the tidal-marginal sea distinction *Toomer* drew. Because the Act draws no distinction between free-swimming and stationary fish, somehow it invalidates the distinction which *Toomer* drew with the consequence that free-swimming fish can be susceptible of ownership.

There are several answers to this.

The Submerged Lands Act was the Congressional response to three cases: *United States* v. *Texas*, 339 U.S. 707 (1950); *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *California*, *supra*. These cases held that the federal government and not the states had paramount rights in the marginal sea and control over the resources therein.

Massachusetts says that the Court in *Toomer* relied heavily on *United States* v. *California*, *supra*, and implies that in

effect the Submerged Lands Act overruled that case. This implication is false. The case was not affected by the Submerged Lands Act which exercised rather than repudiated federal power. *United States* v. *Maine*, 420 U.S. 515 (1975).

Toomer and the other cases hold that free-swimming fish by their very nature are not susceptible of ownership. If they cannot be owned, the Act could not create such ownership, and the United States did not own them. Thus, by the Act, the United States could not grant to the states what it did not own. The Act only granted what the United States had, its power to regulate and manage these resources. The Supreme Judicial Court said as much in construing the ownership language of the Act as legal shorthand for the power to preserve and regulate free-swimming fish (A. 15).

According to *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 318 (1973), "The Act merely confirmed the States' pre-existing rights . . . by, in effect, quitclaiming all federal claims thereto." Since, as just seen, free-swimming fish cannot be owned, the states never had a preexisting right of ownership in the fish that the Act could confirm.

Nor did Congress intend the Act to overrule *Toomer*. 99 Cong. Rec. 2563-2564 (1953), printed in the Addendum (pp. 21-28). Indeed, since Congress recognized *Toomer's* authority, Congress intended the *Toomer* "legal fiction" analysis to control the ownership language of the Act in its application to free-swimming fish.

The courts have not read the Act to resurrect the ownership theory. Rather, they talk in terms of the modern theory of police power. *Corsa* v. *Tawes*, 149 F. Supp. 771 (D. Md. 1957), *aff'd*, 355 U.S. 37 (1957); *Organized Village of Kake* v. *Egan*, 174 F. Supp. 500 (D. Alas. 1959), *aff'd*, 362 P. 2d 901 (Sup. Ct. Alas. 1961), *aff'd*, 369 U.S. 60 (1962); *Glenovich* v. *Noerenberg*, 346 F. Supp. 1286 (D. Alas. 1972), *aff'd*, 409 U.S. 1070 (1972).

III. To Adopt Massachusetts' Position would Burden the Nation with Problems Heretofore Solved.

The Court fashioned *Toomer* v. *Witsell* to correct a feudal situation in the coastal sea. Massachusetts asks the Court to reinstate the legal basis for that situation at the expense of our nationhood. This would be a sordid boon.

Boats must follow fish, and fish know no boundaries. In following a school, or in dragging, a fisherman would have to turn away at the imaginary boundary. Prudently, he would turn away some distance from it lest he inadvertently sail over it. The damaging effect on commercial fishing is obvious.

Commercial fishermen who live in states like New Hampshire, with short shorelines, would be hard put indeed. The territorial waters of such states perforce are small. The effect of Massachusetts' position would be to concentrate commercial fishing in certain states.

Tc overrule *Toomer* and, like Lazarus, resurrect *McCready* would signal the return of the privilege-right distinction. This would mightily disturb other areas of the law. See, *Takahashi* v. *Fish & Game Comm'n, supra,* and *Graham* v. *Richardson, supra.* In the wildlife and natural resources area, it would undercut the utility of the police power as a management tool.

The police power is a more flexible management tool than the special public interest doctrine. It does not come burdened with the metaphysical concepts of old land law. It harmonizes better with other constitutional provisions. And it allows a state to accomplish as much as any state in our nation legitimately needs to accomplish with respect to its natural resources.

At bottom, Massachusetts misconceives the issue. The ownership theory was never an end but only a means. It arose to justify the states' control of and need to control wildlife. Now the police power better furnishes that justification.

Whatever be the basis for the control, and this is the central point, the control must be exercised consistent with the guarantees of the Constitution. This is the teaching of *Toomer.*

In policy as well as in law, Massachusetts' position is wrong.

Conclusion.

The decision below should be affirmed.

Respectfully submitted,

GEORGE M. VETTER, JR.,
HINCKLEY, ALLEN, SALISBURY
& PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.
(401) 274-2000

Of Counsel:
NANCY HALL McMILLEN,
HINCKLEY, ALLEN, SALISBURY & PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.

Dated: December 22, 1976.

Attorneys for Respondent.

Addendum.

99 CONG. REC., PP. 2563-2564 (1953).

MR. COLMER. Mr. Chairman, I offer an amendment.

The Clerk read as follows.

Amendment offered by MR. COLMER: On page 6, line 4, after the words "natural resources", insert the following: "subject to the condition that there shall be no unreasonable disparity between the treatment by a State or its grantees of its citizens and the treatment by such State or its grantees of the citizens of another State in the management, administration, leasing, controlling, developing, and use of the said national resources."

MR. COLMER. Mr. Chairman, on yesterday I addressed the House briefly on this subject, giving advance notice that I proposed to offer this amendment. In the brief time that I have, of course, I cannot go too much into the reasons and the need for this amendment. But the amendment is aimed at one thing and one thing alone. That is to reassert in this legislation what is already considered to be the law with reference to the use and taking of fish, shrimp, and other migratory marine life. Under section 2 of article 4 of the Constitution, there can be no disparagement in the way of treatment among citizens of one State against citizens of another State. We have had in this country, and particularly in my section, a great deal of confusion and chaos, particularly with reference to shrimp boats going from the waters of one State to the waters of another State. Sometimes attempts have been made to pass unreasonable laws requiring exorbitant licenses of the citizens of one State who may want to go into the waters of another State.

MR. WILLIS. Mr. Chairman, will the gentleman yield?

MR. COLMER. I yield.

MR. WILLIS. The gentleman is familiar with the Supreme Court decision involved in the Carolina situation with reference to shrimping. I understand his amendment goes no further than to simply spell out in this bill what the gentleman thinks the Supreme Court held in the matter of licenses and so on for shrimping and for the fishing industry as against one State vis-a-vis another State.

MR. COLMER. I thank my friend for his contribution. Our States adjoin and he knows of the problem there. My amendment merely spells out what the Constitution provides and what the Supreme Court in the South Carolina case, to which my friend referred, announced to be the law. The purpose of this — if you ask why we should have this amendment written into this bill — is to dispell any idea that this tidelands law under the broad terms of this bill with reference to resources would give one State the right to discriminate against the citizens of another State. I hope my friends, the chairman of the committee and of the subcommittee, will see fit to accept this amendment.

MR. CELLER. Mr. Chairman, will the gentleman yield?

MR. COLMER. I yield.

MR. CELLER. Does the State of Louisiana allow citizens of Mississippi to fish in Louisiana waters and vice versa. What is the need of the amendment then, if that is so?

MR. COLMER. I do not want to get into any argument here because there has been extreme controversy between the two States. Not only between those two States but between other States as well. For instance North Carolina and South Carolina and also between Texas and Louisiana and other States which I might mention. Two cases have gone to the Supreme Court. We want to spell out here that this does not grant any additional authority, or attempt to grant any additional au-

thority. That is the purpose of this amendment. I cannot see why there should be any objection to it.

As I pointed out yesterday, migratory fish recognize no artificial boundaries. They travel in the open waters, and as I illustrated in my talk yesterday, there was a gigantic school of shrimp miles square, which was discovered off the coast of Florida about a year and a half ago. That school of shrimp was converged upon by boats from Virginia on the east and Texas on the west. These fishermen from the different States followed the shrimp as they slowly migrated across the waters of Florida, Alabama, Mississippi, Louisiana, and Texas and into the waters of Mexico.

THE CHAIRMAN. The time of the gentleman has expired.

MR. GRAHAM. Mr. Chairman, I rise in opposition to the amendment.

In the first place, Mr. Chairman, the words are entirely superfluous in view of the decision of the Supreme Court. In *Toomer* v. *Witsell* (334 U.S. 385, 393 (1947)), Mr. Justice Vinson, in the majority opinion, said:

In the court below *United States* v. *California* (332 U.S. 19 (1947)) was relied upon for this proposition. Here appellants seem to concede, and correctly so, that such is neither the holding nor the implication of that case; for in deciding that the United States, where it asserted its claim, had paramount rights in the 3-mile belt, the court pointedly quoted and supplied emphasis to a statement in *Skiriotes* v. *Florida*, (313 U.S 69, 75 (1941)).

Our position is that this matter is settled. This is a proposition which could not lead to discrimination on the part of one State against the others and thus open the door to endless litigation. We are opposed to it and ask that the amendment be defeated.

MR. COLMER. Mr. Chairman, will the gentleman yield?

MR. GRAHAM. I yield.

MR. COLMER. I did not get the citation of the case the gentleman read. Was that the South Carolina case?

MR. GRAHAM. That is the South Carolina case, the shrimp-boat case.

MR. COLMER. As I understand the gentleman — and I did not get everything he said —

MR. GRAHAM. I said it was the shrimp-boat case.

MR. COLMER. Of course the main thing I caught were the very unpleasant words that the gentleman rose in opposition, but I did not get the citation.

MR. GRAHAM. I said when the shrimp boats come in in South Carolina.

MR. COLMER. Now, if I understand the gentleman correctly, he takes the position that the provisions of my amendment are already in the law.

MR. GRAHAM. That is right; that is correct.

MR. COLMER. And there is no necessity for this. Then I asked the gentleman what objection there may be to a restatement of it here.

MR. GRAHAM. Just the same as we would not restate the Constitution; that is the law.

MR. COLMER. But the gentleman must realize that it would have a very powerful and deterrent effect upon these intrastate squabbles that have arisen in the past. I regret that the gentleman sees it necessary to oppose this amendment.

MR. GRAHAM. May I say to the gentleman from Mississippi [MR. COLMER] that our position is that the Constitution, of course, is superior to any law of any State, and that has already been decided, and the Supreme Court held as I have indicated. We think it is redundancy, unnecessary, and could serve no good purpose.

MR. MCCARTHY. Mr. Chairman, will the gentleman yield?

MR. GRAHAM. I yield.

MR. MCCARTHY. I think it important that we give attention to this amendment, because it does, I think, draw a line which may save us some trouble in the future. Right now Minnesota is having trouble with South Dakota with regard to migratory birds. The South Dakotans refuse to let us hunt in South Dakota, and we do not know whether the Supreme Court will sustain us or not, but a provision such as this would have saved us the trouble that our duck hunters are experiencing.

MR. GRAHAM. But that is a matter of intrastate and interstate concern and does not apply to foreign waters.

MR. MCCARTHY. These will be interstate waters once the boundaries have been redefined.

MR. GRAHAM. Not altogether, no; there will be the broad ocean also.

THE CHAIRMAN. The question is on the amendment offered by the gentleman from Mississippi [MR. COLMER].

The question was taken; and on a division (demanded by MR. COLMER) there were — ayes 32, noes, 77.

So the amendment was rejected.

MR. COLMER. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by MR. COLMER: On page 6, line 4, after the words "State resources", insert "subject to the condition that there shall be no unreasonable disparity between the treatment by a State or its grantees of its citizens and the treatment by such State and its grantees of the citizens of another State in the management, administration, controlling, use, licensing, and taking of fish, shrimp, and other migratory marine animal life."

MR. GRAHAM. Mr. Chairman, I make the point of order that the amendment is not in order because it is merely the same amendment offered at another place.

MR. COLMER. Mr. Chairman, may I be heard on the point of order?

THE CHAIRMAN. The Chair will hear the gentleman briefly.

MR. COLMER. Mr. Chairman, we disagree with the learned gentleman from Pennsylvania. The first amendment offered went to the whole question of resources affected; oil, minerals, and other matters. This merely goes to fish, shrimp, and other migratory marine life. I hope that the distinguished chairman of the committee will accept this amendment.

THE CHAIRMAN. The Chair believes that the amendment is different in wording; therefore overrules the point of order.

MR. COLMER. Mr. Chairman, of course, I realize what we are up against here today. I am not going to term it steamrollering as has been charged here today, but it is no different from any other proceedings that we have had here in the past. This is just another case of a legislative committee taking the position that the bill is sacred and there must not be any i's dotted or t's crossed.

This amendment is the same proposition that I argued here a moment ago but, as I pointed out in response to the Chair and in response to the objection of the learned gentleman from Pennsylvania, it only affects marine life, while my first amendment covered all resources. That is the point we are concerned about, that is the point that we wish to have restated if it must be restated so that we can stop so far as possible these interstate squabbles. We like to live in peace with our neighbors, we do not want to be squabbling with them and all we are asking here is, according to my ordinarily genial friend from Pennsylvania's contention, for a restatement that that be the law.

I hope that some of that milk of human kindness that pervades him ordinarily when he sits on the aisle will assert itself in his position of authority here and in his desire for protecting the sacredness of the committee bill as it is brought out. I hope the gentleman will accept the amendment; otherwise I realize fully that there is little hope of its adoption in view of what just happened on my first amendment.

But, Mr. Chairman, if this effort does prove to be futile as we have indicated we now suspect so far as the adoption of the amendment is concerned, it is nevertheless conforting to know that it has at least served the purpose of having made the record. And while the amendment may not prevail as part of the law, the debate will indicate conclusively that it is the opinion of the chairman of the Judiciary Committee of the House and the chairman of the subcommittee of the Judiciary Committee of the House as well as the opinion of the House that the substance of the amendment is presently the law of the land. And furthermore that the refusal of the amendment is based entirely and exclusively upon the opinion of the Judiciary Committee and of the House that the provisions of the amendment are now the law of the land and therefore that there is no necessity for a restatement of it in the bill.

MR. GRAHAM. Mr. Chairman, I rise in opposition to the pending amendment. I thank the gentleman from Mississippi for his fine compliment.

Mr. Chairman, it has always been my understanding that anything of a migratory nature, like migratory birds and such, must be settled by treaty or compact. This whole matter can be settled as between the States of Mississippi and Louisiana or between the States south thereof by a compact.

The argument we advanced in the other case applies here. This is limited to fish, but it is no different in our dealing with it than the other. We object to the amendment and we ask for its defeat.

MR. COLMER. Mr. Chairman, will the gentleman yield?

MR. GRAHAM. I yield to the gentleman from Mississippi.

MR. COLMER. The gentleman spoke of compacts. We entered into a compact down in these Southern States on the Gulf of Mexico here a couple of years ago and on the floor of this House I offered an amendment of similar import that would maintain the status quo, which was adopted and passed

unanimously by the House. That is what we are asking you to do here now — to have a restatement of that and a protection of our rights and to stop this squabbling.

THE CHAIRMAN. The question is on the amendment offered by the gentleman from Mississippi [MR. COLMER].

The question was taken; and the Chair being in doubt, the Committee divided and there were — ayes 25, noes 61.

So the amendment was rejected.

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In the

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

OCTOBER TERM, 1976

No. 75-1775

THE COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

JACK B. WESTCOTT,

Respondent.

ON A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL
COURT OF MASSACHUSETTS

SUPPLEMENTAL BRIEF FOR THE PETITIONER

FRANCIS X. BELLOTTI
Attorney General

S. STEPHEN ROSENFELD
Assistant Attorney General

HOWARD WHITEHEAD
Assistant Attorney General

2019 McCormack Building
One Ashburton Place
Boston, Massachusetts 02108
Tel.: (617) 727-1014
Attorneys for the Petitioner

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Preliminary Statement

By invitation of the Court, Massachusetts herewith submits a supplemental brief on the "propriety of this Court's taking judicial notice of the records of the Merchant Vessel Documentation Division of the Coast Guard insofar as those records reveal that Mr. Westcott's vessel, Suzanne, has, since February 9, 1971, been federally enrolled and licensed 'to be employed in carrying on the mackerel fishery.' 46 U.S.C. §§251, 263."

Argument

This Court has, on numerous occasions, taken judicial notice of records kept by the executive branch of the federal government. See, e.g., Bowles v. United States, 319 U.S. 33, 35 (1943) (Selective Service); Tempel v. United States, 248 U.S. 121, 130 (1918) (Department of War); Jones v. United States, 137 U.S. 202, 214-224 (1890) (Department of State). But see Great Northern Railway Co. v. Steinke, 261 U.S. 119, 125-126 (1923) (judicial notice refused as to files of General Land Office). Although the Court has never clearly articulated the basis for its action in these cases, such basis appears to have its roots in the principle that one branch of the government ought to be able to ascertain what another branch of the government is doing without having to resort to the rigors of formal proof. See generally 1 J. WEINSTEIN AND M. BERGER, COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, ¶200[10] (1976). In any event, the cases establish that the records of the various executive departments are a proper subject for judicial notice by this Court.

Conclusion

For the reasons stated above, Massachusetts concludes that the Court may take judicial notice of the records in question. 1/

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General

S. STEPHEN ROSENFELD
Assistant Attorney General

HOWARD WHITEHEAD
Assistant Attorney General

1/ Massachusetts notes, however, that it is unable to discern the relevance of such records to the single issue briefed and argued by the parties.